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No.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

UNITED STATES FOOTBALL LEAGUE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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151 pp

QUESTIONS PRESENTED

1. Does an award of attorney's fees (here, $5.5 million) that has no reasonable relationship to the results obtained (here, $1 damages and no injunctive relief) properly serve the policy of encouraging the institution of private litigation under federal fee-shifting statutes?

2. Does the award of millions of dollars of attorney's fees properly serve the encouragement of private litigation under federal fee-shifting statutes such as Section 4 of the Clayton Act when the District Court and the Court of Appeals have found that the action was brought with bad faith and improper motives contrary to the substantive policies promoted by the fee-shifting statute?

3. Does an award of attorney's fees under a federal fee-shifting statute for time spent on claims dismissed before trial, claims lost at trial, and "irrelevant" or "marginally probative" matters, as well as failed state law claims as to which no fee-shifting statute applies, properly encourage the promotion of private litigation when the results obtained were *de minimis*?

4. Is it proper to award millions of dollars in attorney's fees and thereby encourage private litigation under Section 4 of the Clayton Act to a plaintiff that (a) failed to prove damages; (b) was found to have brought the case for anticompetitive and improper purposes; (c) did not succeed on any significant issue which achieved some of the benefits sought in bringing suit; and (d) was denied any injunctive relief?

LIST OF PARTIES

NATIONAL FOOTBALL LEAGUE, THE FIVE SMITHS, INC., INDIANAPOLIS COLTS, INC., BUFFALLO BILLS, INC., CHICAGO BEARS FOOTBALL CLUB, INC., CINCINNATI BENGALS, INC., CLEVELAND BROWNS, INC., DALLAS COWBOYS FOOTBALL CLUB, INC., ROCKY MOUNTAIN EMPIRE SPORTS, INC., THE DETROIT LIONS, INC., GREEN BAY PACKERS, INC., HOUSTON OILERS, INC., LOS ANGELES RAMS FOOTBALL COMPANY, MINNESOTA VIKINGS FOOTBALL CLUB, INC., NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP, NEW YORK FOOTBALL GIANTS, INC., NEW YORK JETS FOOTBALL CLUB, INC., THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC., PITTSBURGH STEELERS SPORTS, INC., ST. LOUIS FOOTBALL CARDINALS CO., CHARGERS FOOTBALL COMPANY, SAN FRANCISCO FORTY-NINERS, LTD., TAMPA BAY AREA NFL FOOTBALL, INC., PRO-FOOTBALL CLUB, INC., MIAMI DOLPHINS, LTD. AND SEATTLE PROFESSIONAL FOOTBALL,[1]

Petitioners,[2]

v.

UNITED STATES FOOTBALL LEAGUE, ARIZONA OUTLAWS, BALTIMORE STARS FOOTBALL ASSOCIATES, BIRMINGHAM STALLIONS, LTD., CHICAGO USFL LIMITED PARTNERSHIP, CHICAGO FOOTBALL FRANCHISE LIMITED PARTNERSHIP, DENVER GOLD SPORTS, INC., HOUSTON GAMBLERS, LTD., IMI EXPRESS, INC., JAX PROFESSIONALS, INC., LAEFC, LTD., MEMPHIS SHOWBOATS, LTD., FOOTBALL GENERALS, INC., BAY AREA FOOTBALL PARTNERS, LTD., BREAKERS LIMITED PARTNERSHIP, SOUTH TEXAS SPORTS, INC. AND ORLANDO FOOTBALL PARTNERS, INC.,

Respondents.

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[1] Alvin R. Rozelle was named a defendant both as an individual and as Commissioner of the NFL. Judgment was entered in Mr. Rozelle's favor on all claims and the district court did not assess attorney's fees against him.

[2] Pursuant to Rule 28.1, the following corporations are either parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates of any petitioner that is a corporation: KSA Industries, Inc., San Francisco Forty-Niners, Inc. and Jack Kent Cooke Incorporated.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
1. History of the Litigation	4
2. The Decisions Below in the District Court and in the Second Circuit	6
(a) Motion by Plaintiffs	6
(b) The District Court's Decision	7
(c) The Second Circuit's Decision	7
REASONS FOR GRANTING THE WRIT	9
1. There Must Be a Rational Relationship Between a Fee Award and the Result Obtained	9
2. The USFL's Bad Faith and Improper Motive In Bringing Suit Should Have Been Considered by the Courts Below	13
3. Time Devoted to Claims Which Are Dismissed Before Trial or Rejected at Trial Should Not Be Compensable	14
4. Attorney's Fees Should Not Be Awarded to a Plaintiff Which Proves Violation and Injury But Fails to Prove Damages	16
5. Attorney's Fees Should Not Be Awarded to a Plaintiff Which Is Not a Prevailing Party Under *Hensley*	18
6. This Petition Presents Important Questions of Federal Antitrust Law	19
CONCLUSION	21

Page

APPENDICES

APPENDIX A – Opinion of Second Circuit A-1

APPENDIX B – Opinion of United States District Court for the Southern District of New York, 704 F. Supp. 474..... B-1

APPENDIX C – Opinion of Second Circuit on Prior Appeal, 842 F.2d 1335.... C-1

APPENDIX D – Statute Involved..... D-1

TABLE OF AUTHORITIES

Cases Cited

	Page
Argus, Inc. v. Eastman Kodak Co., 612 F. Supp. 904 (S.D.N.Y. 1985), *aff'd*, 801 F.2d 38 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987)	16
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)	19
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)	14
Blum v. Stenson, 465 U.S. 886 (1984)	10, 15
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	19
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	18
City of Riverside v. Rivera, 477 U.S. 561 (1986)	11, 13
Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987)	12
Grip-Pak, Inc. v. Illinois Tool Works, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983)	19
Hensley v. Eckerhart, 461 U.S. 424 (1983)	*passim*
Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962)	16
Home Placement Service, Inc. v. Providence Journal Co., 819 F.2d 1199 (1st Cir. 1987)	10
Kelco Disposal, Inc. v. Browning-Ferris Industries, Inc., 845 F.2d 404 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989)	14
Knutson v. Daily Review, Inc., 479 F. Supp. 1263 (N.D. Cal. 1979)	10

	Page
Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974)	10
Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 478 U.S. 546 (1986)	10, 15
Reazin v. Blue Cross & Blue Shield, Inc., 663 F. Supp. 1360 (D. Kan. 1987)	18
Rosebrough Monument Co. v. Memorial Park Cemetery Association, 572 F. Supp. 92 (E.D. Mo. 1983), *aff'd in relevant part*, 736 F.2d 441 (8th Cir.), *cert. denied*, 469 U.S. 981 (1984)	10, 12
Texas State Teachers Association v. Garland Independent School District, 109 S. Ct. 1486 (1989)	15, 18
Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490 (D. Mass. 1963)	14
USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988)	*passim*
USFL v. NFL, 704 F. Supp. 474 (S.D.N.Y. 1989)	*passim*
USFL v. NFL, 634 F. Supp. 1155 (S.D.N.Y. 1986)	5
USFL v. NFL, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (1988)	13
STATUTES	
15 U.S.C. § 15	*passim*
15 U.S.C. § 26	6, 16, 17
28 U.S.C. § 1254	2
28 U.S.C. § 1331	6
28 U.S.C. § 1337	6
28 U.S.C. § 2201	6
42 U.S.C. § 1988	10
LEGISLATIVE HISTORY	
H.R. Rep. No. 499, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572.	16, 17, 18
S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908	10

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**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

Petitioners, National Football League, *et al.* ("NFL"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered October 10, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit affirming the district court's award of attorney's fees appears in Appendix A hereto, and that of the United States District Court for the Southern District of New York granting attorney's fees, reported at 704 F. Supp. 474, appears in Appendix B hereto. The opinion of the Court of Appeals for the Second Circuit on the merits of the action, reported at 842 F.2d 1335, appears in Appendix C hereto.[1]

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on October 10, 1989, and this Petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is Section 4 of the Clayton Act, 15 U.S.C. § 15. This statute is set out, in relevant part, in Appendix D hereto.

INTRODUCTION

The United States Football League ("USFL") instituted this antitrust suit on the ostensible ground that it wanted to operate as an independent, competing professional football league. In fact, as the evidence at trial made clear, and as the courts below found, the USFL brought this action to force a merger with the NFL. To achieve this anticompetitive end, the USFL alleged that virtually every aspect of the NFL's structure and conduct, primarily the NFL's non-exclusive five-year television broadcast contracts, as well as the con-

[1] Citation to the unreported Second Circuit opinion which is set out in Appendix A hereto is in the form A- . All other citations are to reported opinions.

gressionally approved merger of the NFL and American Football League ("AFL"), violated the antitrust laws. The USFL sought $1.7 billion in damages.

After more than a year of discovery, the district court granted the NFL summary judgment on many of the USFL's allegations. And after a 10 week trial, the jury rejected all but one of the USFL's remaining claims, including its television claims, which the USFL called the "heart" of its case, and awarded the USFL a token single dollar in damages. Thereafter, the district court denied in its entirety the USFL's broad request for injunctive relief.

The Second Circuit rebuffed the USFL's merits appeal and wrote an opinion that confirmed that: (i) the USFL's lawsuit had been brought for anticompetitive purposes; (ii) the USFL's damages proof was fatally flawed and that, in returning the $1 verdict, the jury would have been justified in concluding that no damages were proven at all; and (iii) the evidence supporting the monopolization verdict against the NFL was marginal at best. The USFL did not seek review in this Court.

Subsequently, the district court awarded the USFL more than $5.5 million in attorney's fees—every penny that the USFL paid to its attorneys—and the Court of Appeals affirmed the district court's award. It is the Court of Appeals' attorney's fees opinion to which the instant Petition is addressed.

With respect to attorney's fees, the Court of Appeals reasoned that: (i) to recover attorney's fees under Section 4 of the Clayton Act, a plaintiff does not have to be a "prevailing party" within the meaning of this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983); (ii) Section 4 of the Clayton Act, which provides for the award of attorney's fees in antitrust damages actions, does not require proof of damages for the awarding of attorney's fees but only proof of violation and injury to the plaintiff; (iii) a plaintiff may recover attorney's fees for claims dismissed before trial or rejected in all respects by the jury so long as the district court

otherwise reduced the award by some amount to account for the results obtained; and (iv) notwithstanding the nominal damage award, the private enforcement of the antitrust laws would be encouraged by this award of attorney's fees.

Importantly, the courts below refused to decide whether (i) there must be some rational relationship between a damages verdict and the award of attorney's fees, and (ii) whether attorney's fees should be denied, or drastically reduced, where an antitrust plaintiff's action is brought for reasons diametrically opposed to the purposes of the antitrust laws. The award of $5.5 million in attorney's fees and the supportive reasoning by the lower courts is completely inconsistent with their opinions on the substantive antitrust merits of this case.

The opinions below raise issues of significance not just in antitrust cases, but in all cases involving federal fee-shifting statutes. On the issues decided, as well as the issues that the lower courts failed to decide, the opinions below are in conflict with applicable decisions of this Court, including *Hensley*. They also raise important issues of federal law, including the boundaries, if any, of the promotion of private treble damage actions brought under Section 4 of the Clayton Act, which have not been but should be settled by this Court.

STATEMENT OF THE CASE

1. History of the Litigation

The USFL's complaint raised a myriad of federal and state law claims. The USFL alleged that the NFL conspired to preclude the development of a competing league through contractual arrangements with the three major television networks and the congressionally approved merger of the NFL with the AFL. The USFL further alleged a series of predatory acts that purportedly inhibited the USFL's ability to: (i) negotiate for and obtain national network television exposure and revenues; (ii) negotiate for and obtain contracts with qualified football players; (iii) obtain access to suitable sta-

dia; (iv) obtain access to qualified game officials; (v) attract necessary investors; and (vi) attract favorable media attention, advertisers and fan loyalty.

The district court granted the NFL summary judgment on the USFL's "stadium-related" claims, "disparagement" claims and "game officials" claims. *USFL v. NFL*, 634 F. Supp. 1155, 1175-90 (S.D.N.Y. 1986). Thus, the case that went to trial had as its centerpiece the USFL's allegations relating to its inability to secure a fall television contract. Indeed, prior to and during the trial, the USFL admitted that the only antitrust damages it was seeking to recover were predicated on proof of illegal NFL conduct with regard to television.

The "jury expressly rejected [all of] the television claims." *USFL v. NFL*, 842 F.2d 1335, 1342 (2d Cir. 1988). And, far from awarding the $1.7 billion in television damages the USFL was seeking, the jury awarded the USFL only $1 for illegal monopolization, not of a television submarket as the USFL had hoped, but of a market consisting of major league professional football.

Significantly, the jury based its only verdict against the NFL upon evidence unrelated to television, namely, evidence relating to "NFL attempts to co-opt USFL owners, an NFL Supplemental Draft of USFL players, an NFL roster increase, and NFL conduct directed at particular USFL franchises." *USFL v. NFL*, 842 F.2d at 1341. As the Second Circuit recognized on the merits appeal, these acts, proof of which was based largely on hearsay and speculative testimony or was the subject of significant factual dispute, *see id.* at 1349-50, "were hardly of sufficient impact to support a large damages verdict or to justify sweeping injunctive relief." *Id.* at 1341. Specifically, with respect to the $1 verdict, the Second Circuit stated:

> [I]t is now clear that [the USFL's damages case] was based on a number of assumptions entailing legal premises that were incorrect or factual conclusions that

> were rejected by the jury. In awarding only nominal damages, the jury might reasonably have concluded that *the USFL had failed to prove any damages*.

Id. at 1377 (emphasis added).

The jury's $1 verdict was based on clear evidence of the USFL's suicidal conduct. *See USFL v. NFL*, 842 F.2d at 1370. After its first season of playing football in the spring, the USFL hatched a "Grand Plan" to force a merger with the NFL. By August 1984, the USFL announced that it was shifting its playing schedule to the fall, the same time of the year that the NFL plays its games. *See id.* at 1342. Upon the announced shift to the fall, the USFL sought a fall network television contract to "pressure" the NFL on its revenue side, and initiated a player "salary war" to "hit" the NFL on its expense side.

Only two months later, in October 1984, invoking federal jurisdiction under 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331, 1337 and 2201, the USFL further executed its merger strategy by filing the instant lawsuit. *See USFL v. NFL*, 842 F.2d at 1342. In furtherance of the merger strategy, within the next year, the USFL moved teams out of major television markets and into prospective NFL expansion cities.

As a result, the USFL "ended by its own hand any chance of a network contract," *USFL v. NFL*, 842 F.2d at 1342, and created its own significant financial instability. In short, the USFL failed because "it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league," *id.*, but instead sought "entry into the NFL on the cheap." *Id.* at 1380.

2. The Decisions Below in the District Court and in the Second Circuit

(a) Motion by Plaintiffs

After losing its appeal on the merits, the USFL returned to the district court, requesting $7,539,720.79 in "reasonable" attorney's fees and costs, as well as fees for preparing its fee application under Section 4 of the Clayton Act.

(b) The District Court's Decision

The district court awarded the USFL $5,529,247.25 in attorney's fees. Even though the USFL's damages proof related solely to its television allegations, which were totally rejected by the jury, the district court ruled that the USFL was entitled to attorney's fees as a matter of law because the jury found that the USFL had suffered some antitrust injury. *USFL v. NFL*, 704 F. Supp. 474, 478-79 (S.D.N.Y. 1989). The district court also held that the "prevailing party" standard set forth in *Hensley* was inapplicable to the USFL's entitlement to fees under Section 4 of the Clayton Act. *Id.*

Having found that the USFL was entitled to an award of attorney's fees, the district court compensated the USFL for time spent on its failed television and state law claims as well as for time devoted to claims dismissed before trial. However, recognizing that "the USFL did not succeed on the heart of its case, namely proving substantial damages and specific antitrust violations related to television," the court reduced the lodestar by twenty percent, purportedly to reflect the result obtained, and by an additional ten percent to account for the USFL's vague time records. *USFL v. NFL*, 704 F. Supp. at 485.

(c) The Second Circuit's Decision

The Second Circuit affirmed the district court's judgment in its entirety. After recounting the magnitude of the USFL's loss on the merits in this case, pp. A-4-5, the Second Circuit found that "it is clear from the plain meaning of section 4 that an injury is all that is required for an award of attorney's fees" (p. A-7). Thus, the Second Circuit declined to apply the prevailing party test set forth in *Hensley* – whether the plaintiff "succeeded on any significant issue in litigation which achieves some of the benefit [it] sought in bringing suit" – to determine whether the USFL was entitled to any award at all.

According to the Court of Appeals, once antitrust injury was found by the jury, "the awarding of attorney's fees to the USFL was compulsory" (p. A-7). The Court reasoned

that "[b]ecause of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney's fees *must* be sustained regardless of the amount of damages awarded" (p. A-8) (emphasis added).

With respect to the amount of time that was compensable, the Second Circuit concluded that nearly all of the time spent by USFL counsel on this action was recoverable. Thus, the Court of Appeals affirmed the reimbursement of the USFL for time spent on the failed television claims, as well as for state law claims for which no fee-shifting statute applied, merely because such claims involved a "common core of facts" and were "based on related legal theories" to the claim upon which the USFL prevailed (p. A-12). The Court of Appeals reasoned that allowing compensation for time spent on these claims was proper because (i) the district court took into account the USFL's lack of success by reducing the overall award and (ii) the jury was entitled to consider these failed allegations as "purpose and character" evidence in support of the general monopolization verdict (pp. A-10, A-14).

The Court of Appeals upheld the award for time spent on allegations dismissed before trial because "[t]he development of factual allegations and theories to support a claim is part of the normal litigation process and should be compensable" (p. A-12). It further affirmed compensation for work done on concededly unsuccessful collateral matters such as "at best marginally probative" evidence of prior judgments against the NFL and "irrelevant" congressional testimony by NFL personnel because (i) time spent on these matters was spent on "alternative ways to obtain relief for the NFL's illegal monopolization of professional football" and (ii) the district court reduced the lodestar to reflect the results obtained (p. A-12).

Finally, the Court of Appeals summarily affirmed the twenty percent reduction of the USFL's lodestar and the ten percent reduction to account for vague time records because the district court "considered the relevant factors" (p. A-15).

Although petitioners raised these issues in the courts below, neither the Second Circuit nor the district court considered whether there should be any relationship between the attorney fee award and the damages verdict. Moreover, neither lower court addressed whether the encouragement of private antitrust enforcement must be tempered in cases such as this, where a plaintiff files an overreaching lawsuit in pursuit of an anticompetitive objective and fails completely.

REASONS FOR GRANTING THE WRIT

As petitioners demonstrate herein, the judgment below raises important questions concerning the application of all federal fee-shifting statutes, and particularly the provisions of Section 4 of the Clayton Act. The failure of the lower courts to require any rational relationship between the relief obtained and the amount of the fee award is illogical and provides an improper windfall to plaintiffs (*see* pp. 9-13 , *infra*). Further, by ignoring their own findings concerning the underlying improper and anticompetitive motives of the USFL's suit, the courts below relied on Section 4 to *reward* the bringing of a lawsuit that was squarely at odds with the antitrust laws (*see* pp. 13-14 , *infra*). Moreover, the lower courts incorrectly awarded fees for claims on which the USFL unquestionably failed (pp. 14-15 , *infra*), ignored the USFL's failure to prove damages (pp. 16-18, *infra*), and awarded fees in circumstances flatly inconsistent with this Court's holding in *Hensley* (*see* pp. 18-19, *infra*). Finally, this case presents important issues under Section 4 of the Clayton Act and is for that independent reason worthy of review (*see* pp. 19-20, *infra*.).

1. There Must Be A Rational Relationship Between A Fee Award And The Result Obtained

In all cases in which a federal fee-shifting statute is involved, whether antitrust or otherwise, the Court should require a rational relationship between the fee award and the

result obtained. This case presents the perfect vehicle to review this issue because of the stunning disproportionality between the attorney's fee award and the $1 damage award.

In this case, the Second Circuit affirmed a legal fee 5.5 million times the damage verdict. This award is eighty-eight times greater than any other fee award to an antitrust plaintiff which had recovered only nominal damages.[4]

In a series of decisions, this Court has sought to prevent the award of windfall attorney's fees. Thus, *Hensley* set forth guidelines which, when properly applied, protect against the abuse of fee-shifting statutes. *Hensley* requires the district court to reduce fees for services rendered on unrelated, unsuccessful claims *and*, even when claims are related, to reduce fees so that they are commensurate with the level of success achieved. 461 U.S. at 433.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court held that multipliers should generally not be used to set a reasonable fee. And, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*"Delaware Valley I"*), the Court emphasized that fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client."[5]

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[4] *See, e.g., Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1212 (1st Cir. 1987) ($1 damages case in which $61,136.66 in attorney's fees were awarded); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir.) ($1 damages case in which $7,350 in attorney's fees were awarded), *cert. denied*, 419 U.S. 836 (1974); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 572 F. Supp. 92, 95 (E.D. Mo. 1983) ($1 damages case in which $51,293.95 in attorney's fees were awarded), *aff'd in relevant part*, 736 F.2d 441 (8th Cir.), *cert. denied*, 469 U.S. 981 (1984); *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1279 (N.D. Cal. 1979) ($1 damages case in which $54,078.75 in attorney's fees were awarded).

[5] As Congress recognized in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the aim of fee-shifting statutes in civil rights and in antitrust cases is to attract competent counsel, not to "produce windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2d

In *City of Riverside v. Rivera*, 477 U.S. 561, 585 (1986), where the fees awarded were only seven times the damages awarded, Justice Powell, in his controlling concurrence, stated that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Significantly, Justice Powell observed that it "probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." *Id.* at 586 n.3 (emphasis in original).

Justice Rehnquist's dissent in *Riverside*, which commanded four votes, similarly stressed that the hours for which an attorney seeks compensation must be *reasonable* in relation to the result obtained. *Riverside*, 477 U.S. at 588-91. The reasonableness of hours expended largely turns on the amount of damages reasonably expected to be recovered. *Id.* at 593. This judgment must be made not only before an action is brought, but also must be reevaluated during its pendency. In Justice Rehnquist's view, Congress could never have intended "to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages." *Id.* at 595.

Justice Powell's concurrence and Justice Rehnquist's dissent are equally applicable to private antitrust cases and build on *Hensley*'s requirement that "the important factor" in determining a "reasonable" fee is the "result obtained." 461 U.S. at 434. Notably, requiring a reasonable relationship between the fee award and a damages verdict does not discourage meritorious lawsuits. Plaintiffs in such suits will recover fees commensurate with their success because either they recover substantial damages or their lawsuit benefits the public interest. However, requiring a reasonable relationship would ensure that defendants will not bear the cost of surrealistic

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Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5913.

claims which are rejected only after years of expensive, time-consuming litigation.

The USFL failed to obtain any of what it claimed it needed: damages in excess of $1 billion, a guaranteed network television contract or a merger with the NFL. Although the Court of Appeals acknowledged "the USFL's lack of success," p. A-12, it failed to follow *Hensley*'s admonition that the "result is what matters" when determining a reasonable fee. Moreover, the USFL was reimbursed for every penny it paid its counsel, thereby replicating the USFL's fee arrangement with its counsel.[6]

There is no billing judgment evident in the USFL's expenditure of over $7 million to litigate the legality of a congressionally approved merger or the NFL's non-exclusive short term television contracts so that the USFL might recover $1 in damages. Nor can there be any pretense that the USFL's action served the public interest, as a reading of the Second Circuit's merits opinion demonstrates. *See, e.g., USFL v. NFL*, 842 F.2d at 1341-42, 1369-70, 1380.

Since the relationship of (a) the 20 percent reduction of the $7 million in time expended to (b) the USFL's complete failure on its core claims and the $1 verdict was not and, indeed, cannot be logically explained, the lower courts clearly abused their discretion in awarding $5.5 million. *See Greater Los Angeles Council on Deafness v. Community Television of Southern California*, 813 F.2d 217, 222 (9th Cir. 1987) (reversing "patently excessive" fee award as a matter of law); *Rosebrough Monument*, 572 F. Supp. at 95 (where nominal damages awarded in antitrust case, in evaluating the appropriate amount of fees, court's "evaluation must necessarily include a consideration of the amount of damages recovered compared to the amount sought, as well as all other relief

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[6] Under the fee arrangement between the USFL and its counsel, counsel was paid at its normal hourly rates throughout the litigation. Thus, the fee award effectively duplicates the USFL's private fee arrangement with its counsel.

(including injunctive relief) that collectively measures the fruits of plaintiff's efforts").

Here, obviously, the "fruits of plaintiff's efforts" included neither damages nor injunctive relief of any kind. Accordingly, appropriate consideration of the results obtained should have yielded a minimal, if any, award.

The concerns addressed by the Court in *Hensley* and in *Riverside* have become manifest here. In effect, the Second Circuit has "turned attorneys loose" to launch indiscriminate private treble damage antitrust litigation even if there is little basis for the claims. This abuse of the fee-shifting provisions of the Clayton Act must be corrected.

2. The USFL's Bad Faith And Improper Motive in Bringing Suit Should Have Been Considered by the Courts Below

In its attorney's fees opinion, the Second Circuit ignored the district court's and its own factual findings that the USFL brought this lawsuit in bad faith to force a merger with the NFL, and not to stop or deter anticompetitive behavior.

Thus, in castigating the USFL for using this lawsuit to further its merger strategy, the district court stated that "[w]hen a firm which has committed myriad blunders in the marketplace seeks to gain benefits through treble damages that it could not acquire through fair competition, *neither juries nor courts should be condemned for obstructing such an effort.*" *USFL v. NFL*, 644 F. Supp. 1040, 1054-55 n.12 (S.D.N.Y. 1986) (emphasis added), *aff'd*, 842 F.2d 1335 (1988). The Second Circuit made similar observations. *See USFL v. NFL*, 842 F.2d at 1380 (by its merger strategy, the USFL did not promote competition but rather sought entry into the NFL "on the cheap").

The Second Circuit also ignored its legal conclusion that the merits of the lawsuit were marginal at best. Thus, the Second Circuit found that the jury's monopolization verdict was based on evidence that was "hardly of sufficient impact

to support a large damages verdict or to justify sweeping injunctive relief." *Id.* at 1341.

In holding that evidence of the USFL's self-destructive conduct was properly admitted at trial, the Second Circuit observed: "evidence of business decisions made by the USFL pursuant to the merger strategy was highly relevant to the issues of causation and damages" under Section 4. *USFL v. NFL*, 842 F.2d at 1369. Attorney's fees under Section 4 are an element of damages. *See, e.g., Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404, 411 (2d Cir. 1988) (Section 4 attorney's fees are part of the entire Section 4 treble damages remedy), *aff'd*, 109 S. Ct. 2909 (1989); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 493 (D. Mass. 1963) (Section 4 attorney's fees are considered an "additional element of damages" which sound in tort).

The USFL's bad faith motives underlying this lawsuit as well as the USFL's suicidal conduct is every bit as relevant to the attorney's fee award as it is to the issue of damages. Evidence of such conduct should have been considered by the lower courts in the attorney's fee determination. Just as the plaintiff with unclean hands must bear the damage he caused to himself, the antitrust plaintiff who brings suit in bad faith and with improper motive should bear the cost of his suit. *See USFL v. NFL*, 842 F.2d at 1369. The Second Circuit's contrary holding nullifies the jury's damages verdict.

3. Time Devoted to Claims Which Are Dismissed Before Trial or Rejected at Trial Should Not Be Compensable

The Second Circuit's award of fees to the USFL for time devoted to its rejected television case, claims dismissed before trial, state law claims, and other irrelevant, collateral matters was improper for several reasons.

First, under the Clayton Act, damages must flow from the violation found by the jury. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). Because the jury found that the

NFL's conduct with respect to television was legal, no damages could have flowed from this conduct. Second, even if viewed as "purpose and character" evidence, this evidence could be probative of only legal behavior because the jury found that the NFL's television-related behavior was legal. Thus, the time the USFL spent on its rejected television case could have swayed the jury only toward exonerating the NFL; this is not a related claim compensable under *Hensley*.

Third, while purpose and character evidence may illuminate conduct, it has nothing to do with proof of damages. Thus, mindful of *Hensley*'s admonition that "[t]he result is what matters," the USFL should not have been compensated for time devoted to its damages case. Fourth, the district court and the Second Circuit compensated the USFL for time spent on its failed state law claims although there is no statutory basis for such compensation.

With respect to work done on federal claims dismissed before trial and on irrelevant collateral matters, the Second Circuit reasoned that (i) work done in relation to claims dismissed before trial was compensable because the unfruitful expenditure of time "is part of the normal litigation process" and (ii) time devoted to concededly "irrelevant" and "at best marginally probative" evidence was partly compensable as it was part of an exploration of alternative grounds for relief (pp. A-12-13).

The Second Circuit's reasoning eviscerates *Hensley* and this Court's other decisions, such as *Blum* and *Delaware Valley I*, that have attempted to place some limitation on the award of legal fees to private parties. *Hensley* states that time spent on alternative legal grounds is compensable only when a plaintiff has obtained "excellent results." 461 U.S. at 435. And *Delaware Valley I* cautions against awarding fees that might otherwise be compensable under a private fee arrangement. *See also Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1493 (1989) (where result obtained is *de minimis*, no fee should be awarded).

4. Attorney's Fees Should Not Be Awarded to a Plaintiff Which Proves Violation and Injury But Fails to Prove Damages

The Second Circuit's holding that "a finding of an injury is all that is required for an award of attorney's fees for an antitrust violation [under Section 4]," p. A-10, is contrary to case law, to the plain meaning of the Clayton Act and to congressional intent. To recover under Section 4, a plaintiff must prove not only: (i) a violation of the antitrust laws, and (ii) antitrust injury resulting from the violation, but also (iii) an amount of damages attributable to the violation and antitrust injury found.

Failure to prove damages dooms a Section 4 action. *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 909 (2d Cir.) (upholding directed verdict because there can be no recovery under Section 4 of the Clayton Act "unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted"), *cert. denied*, 369 U.S. 865 (1962); *Argus, Inc. v. Eastman Kodak Co.*, 612 F. Supp. 904, 923-24 (S.D.N.Y. 1985) (same), *aff'd*, 801 F.2d 38 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

In addition, Section 4 uses the conjunctive "and" in setting out the relationship between injury, damages and attorney's fees. It clearly contemplates that an antitrust plaintiff must *sustain damages* as a result of antitrust injury and *only* then will attorney's fees be awarded. There is no other explanation for the phrase that an antitrust plaintiff "shall recover threefold the damages by him sustained, *and* the cost of suit including a reasonable attorney's fee" (emphasis added).

The requirement that a Section 4 plaintiff prove damages led Congress to amend Section 16 of the Clayton Act (which governs antitrust injunctive actions) to permit the award of attorney's fees for plaintiffs who obtain limited relief in injunction proceedings. H.R. Rep. No. 499, 94th Cong., 2d

Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2588-89 ("H.R. Rep. No. 499"). Under Section 16 of the Clayton Act, an antitrust plaintiff who "substantially prevails" in an action for injunctive relief may recover attorney's fees. 15 U.S.C. § 26 (as amended).

Congress recognized that "the need for the awarding of attorneys' fees in § 16 injunction cases is greater than the need in § 4 treble damage cases [because] [i]n damage cases, a prevailing plaintiff recovers compensation, at least." H.R. Rep. No. 499 at 2589. Thus, the attorney's fee provision of Section 16 of the Clayton Act was designed to ease the burden for a plaintiff seeking fees and to encourage the enforcement of the antitrust laws. To permit a Section 4 plaintiff to recover fees without proving damages renders Section 16 superfluous, a result Congress could not have intended.

Just as a Section 16 plaintiff who fails to secure "substantial" relief may not recover fees, so too should a Section 4 plaintiff who fails to secure damages not recover attorney's fees. Indeed, because the Section 4 private action is presumptively for private benefit, there is even less reason to award substantial fees to a failed Section 4 plaintiff. Such a result is even more compelling in a case such as this where the plaintiff was denied any injunctive relief at all, and therefore the litigation resulted in no benefit to the public.

The USFL failed to prove damages in this case. Indeed, the USFL failed even to offer damages evidence on the non-television-related acts found unlawful by the jury. Since the USFL's damages case "was based on a number of assumptions entailing legal premises that were incorrect or factual conclusions that were rejected by the jury," *USFL v. NFL*, 842 F.2d at 1377, it is pure speculation for the Second Circuit to suggest that the television damages proof "*may* have affected the jury's finding of general antitrust damages" (p. A-9) (emphasis added). Indeed, in its merits opinion the Second Circuit stated: "In awarding only nominal damages, the jury might reasonably have concluded that the USFL had

failed to prove any damages." *USFL v. NFL*, 842 F.2d at 1377. Having failed to prove damages, the USFL should not have recovered any fees under Section 4.

5. Attorney's Fees Should Not Be Awarded to a Plaintiff Which Is Not a Prevailing Party Under *Hensley*

The lower courts improperly failed to apply *Hensley* to determine whether the USFL was entitled to any fee award. *Hensley* instructs lower courts to award fees only if a party has prevailed, *i.e.*, if it "succeeds on any significant issue in litigation which achieves some of the benefit sought in bringing suit." Significantly, this Court in *Hensley* was *very* careful not to limit its decision to civil rights fee-shifting schemes.

In discussing the prevailing party standard, the Court expressly held that "[t]he standards set forth in this opinion are generally applicable in *all* cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 U.S. at 433 n.7. *See also Texas State Teachers*, 109 S. Ct. at 1489 (1989) (reviewing meaning of prevailing party "because of the importance of the definition of the term . . . to the application of § 1988 and other federal fee shifting statutes"); *Reazin v. Blue Cross & Blue Shield, Inc.*, 663 F. Supp. 1360, 1450 (D. Kan. 1987) (Section 4 case applying "prevailing party" standard); H.R. Rep. No. 499 at 2588 (noting that under Section 4 an "award of attorneys' fees is made . . . [to] a *prevailing plaintiff*") (emphasis added).[7]

As demonstrated above, the USFL did not prevail within the meaning of *Hensley* and should not recover any attorney's fees. *See Texas State Teachers*, 109 S. Ct. at 1493. Moreover, Congress intended for it to be more difficult to obtain attorney's fees in antitrust damages cases than in antitrust injunction cases. The Second Circuit's refusal to apply the

[7] Even though the words "prevailing party" do not appear in Section 4, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), this Court cited Section 4 as one of the fee-shifting statutes that "make[s] fee awards mandatory for *prevailing* plaintiffs." *Id.* at 415 & n.5 (emphasis added).

Hensley test in antitrust damages cases, but instead to award fees "automatically," turns congressional intent on its head.

6. This Petition Presents Important Questions of Federal Antitrust Law

The purpose of the attorney's fee provision of Section 4 of the Clayton Act is to encourage parties to bring actions that protect competition, not just a competitor. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The questions presented by this Petition require the Court to address the limits, if any, to the encouragement of private treble damage actions under Section 4 of the Clayton Act.

Private treble damage actions are susceptible to abuse. The Second Circuit has cautioned that courts "must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (rejecting one competitor's efforts to force another competitor to share its innovative technology), *cert. denied*, 444 U.S. 1093 (1980); *see also Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466, 472 (7th Cir. 1982) (a lawsuit filed by a competitor may itself be an antitrust violation), *cert. denied*, 461 U.S. 958 (1983). The district court and the Second Circuit echoed these concerns in their merits opinions in this case, but ignored them in their attorney's fees opinions.

For these reasons, not every plaintiff that achieves a *de minimis* result in an antitrust action should recover a fully compensatory fee. There must be limits, based upon measuring the potential costs against the potential benefits, to the award of attorney's fees to a Section 4 plaintiff that proves a violation and injury but little, if any, damages. Such limits would not inhibit the effective enforcement of the antitrust laws.

A cost-benefit analysis would not deter bona fide plaintiffs from initiating meritorious or even novel treble damage actions because the potential reward of treble damages or in-

junctive relief will outweigh the risk of loss. A limitation upon awards would, however, discourage plaintiffs from filing broadly alleged and poorly grounded treble damage actions seeking anticompetitive results.

Moreover, a rule requiring a reasonable relationship between an antitrust treble damage award and a legal fee award will not discourage the filing of meritorious private antitrust litigation; instead it will force plaintiffs to litigate their cases more efficiently by framing their complaints more carefully and avoiding unnecessary discovery and motion practice as well as unduly prolonged trials. Indeed, such a limitation will discourage the indiscriminate, strike-suit cases that are too frequently faced by antitrust defendants.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the decision of the Second Circuit should issue.

Dated: November 30, 1989

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1265—August Term, 1988
(Argued June 19, 1989 Decided October 10, 1989)
Docket No. 89-7243

UNITED STATES FOOTBALL LEAGUE, ARIZONA OUTLAWS, BALTIMORE STARS FOOTBALL ASSOCIATES, BIRMINGHAM STALLIONS, LTD., CHICAGO USFL LIMITED PARTNERSHIP, CHICAGO FOOTBALL FRANCHISE LIMITED PARTNERSHIP, DENVER GOLD SPORTS, INC., HOUSTON GAMBLERS, LTD., IMI EXPRESS, INC., JAX PROFESSIONALS, INC., LAEFC, LTD., MEMPHIS SHOWBOATS, LTD., FOOTBALL GENERALS, INC., BAY AREA FOOTBALL PARTNERS LTD., BREAKERS LIMITED PARTNERSHIP, SOUTH TEXAS SPORTS, INC., and ORLANDO FOOTBALL PARTNERS, INC.,

Plaintiffs-Appellees,

—v.—

NATIONAL FOOTBALL LEAGUE, THE FIVE SMITHS, INC., INDIANAPOLIS COLTS, INC., BUFFALO BILLS, INC., CHICAGO BEARS FOOTBALL CLUB, INC., CINCINNATI BENGALS, INC., CLEVELAND BROWNS, INC., DALLAS COWBOYS FOOTBALL CLUB, INC., ROCKY MOUNTAIN EMPIRE SPORTS, INC., THE DETROIT LIONS, INC., GREEN BAY PACKERS, INC., HOUSTON OILERS, INC., LOS ANGELES RAMS FOOTBALL COMPANY, MINNESOTA VIKINGS FOOTBALL COMPANY, MINNESOTA VIKINGS FOOTBALL CLUB, INC., NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP, NEW YORK FOOTBALL GIANTS, INC., NEW YORK JETS FOOTBALL CLUB, INC., THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC., PITTSBURGH STEELERS SPORTS, INC., ST. LOUIS FOOTBALL CARDINALS CO.,

CHARGERS FOOTBALL COMPANY, SAN FRANCISCO FORTY-NINERS, LTD., TAMPA BAY AREA NFL FOOTBALL, INC., PRO-FOOTBALL CLUB, INC., MIAMI DOLPHINS, LTD., SEATTLE PROFESSIONAL FOOTBALL and ALVIN R. ROZELLE, individually and as Commissioner of the National Football League,

Defendants-Appellants.

Before:

MESKILL and PIERCE, *Circuit Judges*,
and TENNEY,* *District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Leisure, *J.*, awarding plaintiffs-appellees $5,529,247.25 in attorney's fees against defendants-appellants and taxing $62,220.92 in costs against defendants-appellants for work done in connection with an antitrust suit that resulted in a jury verdict of $1.00, trebled to $3.00, in favor of plaintiffs-appellees.

Affirmed.

FRANK ROTHMAN, New York City (William H. Mulligan, Barry H. Garfinkel, Shepard Goldfein, Skadden, Arps, Slate, Meagher & Flom, L. Gordon Harriss, Davis Polk & Wardwell, New York City, Paul J. Tagliabue, Covington & Burling, Washington, D.C., of counsel), *for Appellants*.

HARVEY D. MYERSON, New York City (Mark E. Segall, Douglas R. Pappas, Myerson & Kuhn, New York City, of counsel), *for Appellees*.

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* Honorable Charles H. Tenney, United States District Judge for the Southern District of New York, sitting by designation.

MESKILL, *Circuit Judge:*

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Leisure, *J.*, awarding plaintiffs-appellees the United States Football League and certain of its member clubs (hereinafter collectively referred to as "the USFL") $5,529,247.25 in attorney's fees against defendants-appellants the National Football League and certain of its member clubs (hereinafter collectively referred to as "the NFL") and taxing $62,220.92 in costs against the NFL for work done in connection with an antitrust suit that resulted in a jury verdict of $1.00, trebled to $3.00, in favor of the USFL. The district court's opinion is reported as *United States Football League v. National Football League,* 704 F.Supp. 474 (S.D.N.Y. 1989).

We affirm.

BACKGROUND

This case comes to us after what has been a much litigated and publicized dispute between the USFL and the NFL. Because the facts have been set forth in other published opinions, *see, e.g., United States Football League v. National Football League,* 842 F.2d 1335 (2d Cir. 1988); *United States Football League v. National Football League,* 644 F.Supp. 1040 (S.D.N.Y. 1986), familiarity with which is assumed, we will only briefly recount the history and background of this litigation.

The USFL brought suit in the United States District Court for the Southern District of New York against the NFL and its Commissioner Alvin R. Rozelle seeking declaratory and injunctive relief in addition to damages resulting from the NFL's alleged violations of sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 (1982) (the Sherman Act) and common law. After a lengthy trial, the jury found that the NFL had willfully acquired or maintained monopoly power in the United States major league professional football market. Further, the jury found that the NFL's actual mo-

nopolization of the major league professional football market had caused injury to the USFL's business or property in violation of section 2 of the Sherman Act. The jury awarded the USFL damages of $1.00, which the court trebled to $3.00.

The USFL was not successful on its other claims. None of the defendants was found to have violated section 2 of the Sherman Act by monopolizing or attempting to monopolize a relevant television submarket. The jury also found that although one or more of the defendants had participated in a combination or conspiracy with intent to acquire or maintain monopoly power in the major league professional football market, there were no overt acts taken by any member of the conspiracy to try to achieve that result. Regarding the claim of violation of section 1 of the Sherman Act, the jury found that one or more of the defendants did participate in a contract, combination or conspiracy to exclude competition in the major league professional football market. However, the jury concluded that that combination did not constitute an unreasonable restraint of trade in violation of section 1 of the Sherman Act. Further, the jury concluded that the NFL's contracts with the three major television networks for the right to televise the NFL's regular season and championship games through the 1986-87 season were not an unreasonable restraint of trade in violation of section 1 of the Sherman Act. The jury found that a national network television broadcast contract was essential to successful competition in the United States and that the NFL's potential competitors could not duplicate the benefits of a network contract. However, the jury went on to conclude that the NFL did not have the ability to deny actual or potential competitors access to a national broadcast television contract. No liability was found on the USFL's common law claims of intentional interference with the USFL's television contracts or advantageous business relations. Defendant Rozelle was not found liable on any of the USFL's claims.

Despite the jury's findings that the NFL had willfully acquired or maintained monopoly power in the United States major league professional football market and that such monopolization had injured the USFL, the jury awarded the USFL only $1.00 in damages. In accordance with section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982), the award was trebled to $3.00.

The district court denied the USFL's motion for judgment notwithstanding the verdict with respect to the antitrust claims that were rejected by the jury and for a new trial limited to the issue of damages for the section 2 violation that the jury found, or in the alternative for a new trial on both liability and damages for all of the antitrust claims. The USFL's request for injunctive relief was also denied. Further, the district court denied the NFL's motion for judgment notwithstanding the verdict with respect to the jury's verdict on the USFL's claim of actual monopolization. The district court declined to disturb any of the jury's findings. *United States Football League,* 644 F.Supp. 1040. We subsequently affirmed. *United States Football League,* 842 F.2d 1335.

The USFL then petitioned the district court, pursuant to section 4 of the Clayton Act, for an award of $7,662,709.13[1] as reasonable attorney's fees and expenses resulting from the litigation. This figure was reached after the USFL had exercised "billing judgment" and on its own accord reduced the fee by twenty percent. Additionally, the USFL sought fees for the time spent preparing the fee application. The USFL also filed a motion in the district court, pursuant to Fed. R. Civ. P. 54(d) and Local Civil Rule 11 of the Southern District of New York, for an award of $62,220.92 for costs incurred in litigating the case up to that point. Counsel for the USFL submitted affidavits to substantiate the amounts of their requests. The issues presented to the district court were (1) the adequacy of the documentation of the fees; (2) whether the USFL should receive attorney's fees at all; (3) the proper

[1] The district court erroneously stated that the adjusted claimed amount requested was $7,662,702.13.

amount of those fees; and (4) whether the costs of the USFL's fee application were recoverable.

The district court reduced the amount of the ultimate fee award by ten percent because of vagueness in the documentation of the time billed. *United States Football League,* 704 F.Supp. at 477. The amount requested was reduced by an additional twenty percent to reflect what the court deemed was a "reasonable" fee under section 4 of the Clayton Act. *Id.* at 486. The district court concluded that "the reduced fees for the litigation of the main action total $5,271,504.55." *Id.* The court calculated that the aggregate amount of fees expended in relation to the fee application, up to that point, was $243,786.26. The court added the two fees, resulting in a total fee award of $5,515,290.87. *Id.* at 487. In the court's disposition of the case, it provided that within thirty days the USFL could submit additional affidavits concerning fees incurred in preparing the fee application. The court also found that $62,220.92 in costs were taxable against the NFL. *Id.* at 488. The USFL submitted additional affidavits regarding the amount of fees it had incurred in preparing the fee application. In a judgment filed February 8, 1989, the court awarded $5,529,247.25 in attorney's fees against defendants, except Rozelle, and taxed costs in the amount of $62,220.92 against defendants, except Rozelle.

The instant appeal followed. On appeal, the NFL contends that (1) the district court erred as a matter of law in holding that the USFL was entitled to attorney's fees and costs under section 4 of the Clayton Act; (2) the district court's award of over $5.5 million in attorney's fees was excessive; (3) the district court erred as a matter of law in awarding attorney's fees for paralegals' time; (4) the district court erred as a matter of law in holding that out-of-pocket expenses may be awarded as part of the attorney's fees. For the following reasons, we affirm the judgment of the district court.

DISCUSSION

A. *USFL's Entitlement to an Award of Attorney's Fees*

Section 4 of the Clayton Act states, in pertinent part, that "*any person who shall be injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and *shall recover* threefold the damages by him sustained, and the cost of suit, including *a reasonable attorney's fee.*" 15 U.S.C. § 15(a) (emphasis added). It is clear from the plain meaning of section 4 that an injury is all that is required for an award of attorney's fees. An award of attorney's fees to the injured party is mandatory. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 415 & n.5 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 261 (1975); *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.,* 635 F.2d 118, 130 (2d Cir. 1980), *aff'd,* 456 U.S. 556 (1982). In the instant case, the jury found that the NFL's monopolization of the United States major league professional football market injured the USFL. An injury having been found, the awarding of attorney's fees to the USFL was compulsory.

The award of only nominal damages to the USFL does not affect its right to attorney's fees. As we noted in our earlier opinion in this case, the award of nominal damages in antitrust cases is not "suspect." *United States Football League,* 842 F.2d at 1377. Even where only nominal damages are recovered, attorney's fees awards have been given. *See, e.g., Home Placement Serv., Inc. v. Providence Journal Co.,* 819 F.2d 1199, 1210 (1st Cir. 1987); *Morning Pioneer, Inc. v. Bismarck Tribune Co.,* 493 F.2d 383, 390 (8th Cir.), *cert. denied,* 419 U.S. 836 (1974). That the USFL only received nominal damages is relevant in determining the amount of fees allowed and may be a factor used in reducing a fee award, but it does not affect the entitlement to an award. *See Home Placement Serv.,* 819 F.2d at 1210.

As the First Circuit has stated, the purpose behind mandatory attorney's fees in antitrust cases is "to encourage private prosecution of antitrust violations by insulating plaintiffs'

treble damage recoveries from the expense of legal fees." *Id.* What is important is encouraging the detection and cessation of anticompetitive behavior, not the amount of damages found. Because of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney's fees must be sustained regardless of the amount of damages awarded.

In an attempt to circumvent the mandatory awarding of attorney's fees, the NFL contends that the district court erred in not applying the "prevailing party" standard in determining whether a party is entitled to an award of attorney's fees. The NFL, relying on *Hensley v. Eckerhart,* 461 U.S. 424 (1983), argues that only prevailing parties are entitled to attorney's fees and that a party is a "prevailing party" only if it " 'succeed[s] on any significant issue in litigation which achieves some of the benefit [it] sought in bringing suit.' " *Hensley,* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978)). *See also Texas State Teachers Association v. Garland Independent School District,* 57 U.S.L.W. 4383 (U.S. Mar. 28, 1989) (reaffirming *Hensley* approach). The NFL asserts that because the USFL was unsuccessful on many of its claims, it has not succeeded on significant issues in the litigation, has not achieved the benefits it sought in bringing suit and therefore is not entitled to an award of attorney's fees. We disagree. We reach the same conclusion as the district court that the use of the *Hensley* prevailing party analysis is not warranted in this case.

First, there is no requirement in section 4 of the Clayton Act that an antitrust plaintiff be a "prevailing party" to recover attorney's fees. The term "prevailing party" appears nowhere in section 4 of the Clayton Act. All that is required is an injury. *See supra.* As stated *supra,* an injury was found, therefore the award of attorney's fees was automatic.

Second, *Hensley* involved the award of attorney's fees under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), which provides, in pertinent part, that "the court, *in its discretion*, may allow the prevailing party,

other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added). Interestingly, the legislative history of section 1988 indicates that Congress "intended that the amount of fees awarded under [section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." S. Rep. No. 1011, 94th Cong., 2nd Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5913; *see also McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983). However, Congress did not utilize the mandatory awarding of fees scheme found in section 4 of the Clayton Act, but instead adopted a discretionary standard. Because *Hensley* concerns the discretionary award of attorney's fees under 42 U.S.C. § 1988, rather than the mandatory ordering of attorney's fees awards under 15 U.S.C. § 15(a), it is of limited applicability. Given the clear language of section 4 of the Clayton Act, an award of attorney's fees was justified.[2]

The NFL also claims the USFL is not entitled to attorney's fees because "the USFL failed to *offer* proof of damages" in support of the claim on which it prevailed. Although the USFL's damages evidence, elicited through the testimony of Dr. Nina W. Cornell, focused primarily on damages resulting from the NFL's monopolization of television contracts with the three major networks, the USFL did offer it and it may have affected the jury's finding of general antitrust damages. As the district court stated in an earlier opinion, "the jury's rejection of plaintiffs' television-related Section 1 claims does not mean that the jury could not have properly considered some of the NFL's television-related conduct to have been anticompetitive." *United States Football League*, 644 F.Supp. at 1058. The court explained that "the jury was allowed to consider defendants' television-related behavior . . .

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[2] There are a number of statutes that also mandate attorney's fees but, unlike the Clayton Act, also apply the "prevailing party" concept discussed in *Hensley*. *See, e.g.*, 7 U.S.C. § 210(f); 15 U.S.C. § 26; *id.* § 4304(a); 18 U.S.C. § 924(d)(2)(A)-(B); 42 U.S.C. § 6104(e)(1); *id.* § 11113. We do not address how the questions before us would be resolved in the context of cases covered by these statutes.

as probative of the 'purpose and character' of the remainder of NFL conduct under the jury's scrutiny." *Id.* at n.15 (quoting *United Mine Workers v. Pennington,* 381 U.S. 657, 670-71 n.3 (1965)). As the district court held in a recent opinion, "[t]he USFL's damages proof, while relating solely to television, did seek generally to establish damages from the unlawful monopolization of professional football. It cannot be said that such proof had no effect on the jury's finding of injury." *United States Football League,* 704 F.Supp. at 480. The court went on to state that "it cannot be said that the television evidence was completely distinct, either factually or legally, from the broad monopolization claim that plaintiff prevailed upon." *Id.* at 480-81. The district court's determination was correct.

Neither this Court nor the district court can know for certain what evidence influenced the jury's decision. It is at least plausible that the evidence of the damages from television-related conduct influenced the jury's finding of generalized monopolization damages. The jury did find an injury, which led to a finding of damages, albeit only $1.00. However, a finding of an injury is all that is required for an award of attorney's fees for an antitrust violation.

In sum, we agree with the district court's conclusion that "[t]he award of counsel fees itself is . . . a non-issue." *Id.* at 480.

B. *The Amount of the Attorney's Fees Award*

In determining the amount of the award, a "lodestar" figure is set by "multiplying the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 563 (1986). The lodestar figure may be adjusted upward or downward, however, there is "[a] strong presumption that the lodestar figure . . . represents a 'reasonable' fee." *Id.* at 565.

The district court found that "*[s]ome* reduction of the gross lodestar amount is undoubtedly proper in this case, given the limited success of the USFL, and its recovery of only nominal damages." *United States Football League*, 704 F.Supp. at 484. The lodestar, as such, was reduced by twenty percent. The NFL contends that the lodestar figure should have been reduced more. We note that a party advocating the reduction of the lodestar amount bears the burden of establishing that a reduction is justified. *Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976). The NFL has failed to meet that burden here. In this case, the district court acted within its discretion in considering a number of factors to determine the reasonableness of the amount of the attorney's fees award.

1. *NFL's Objections to Elements of the Fee Application*

The NFL challenges the district court's failure to exclude certain elements that the USFL claimed in its fee application. Specifically, the NFL objects to the district court's failure to exclude attorney's fees for time devoted to the (1) television contract claim and consequent damages; (2) allegations dismissed before trial; and (3) unsuccessful collateral matters.

In *Hensley*, the Supreme Court noted that work on an unsuccessful claim that is based on different facts and legal theories than a successful one may not be included in the fee award. *See Hensley*, 461 U.S. at 434-35. However, a plaintiff's diverse claims for relief may "involve a common core of facts or . . . be based on related legal theories." *Id.* at 435. In that instance, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* The Court held that under those circumstances, the district court "should focus on the significance of the overall relief obtained by the plaintiff." *Id.* Where "a plaintiff has achieved only partial or limited success," full compensation for attorney's fees would not be reasonable. *Id.* at 436. The district court may either "attempt to identify specific hours that should be eliminated,

or it may simply reduce the award to account for the limited success." *Id.* at 436-37.

In the instant case, all of the USFL's claims involve "common core of facts" and are "based on related legal theories." *Id.* at 435. However, the USFL was successful on only one of its claims. To compensate for this limited success, the district court exercised its discretion by reducing the amount of the award. Because the district court took into account the USFL's lack of success by reducing the overall attorney's fees award by a certain percentage, allowing compensation for time spent on all of the claims was correct.

Here, as previously discussed, the television damages claim was related to the general claim of monopolization of the professional football market in the United States. *See supra.* Therefore, the NFL's objection to the inclusion of time spent in relation to this claim must fail.

The NFL also objects to the district court's failure to exclude time spent by the USFL's attorneys on allegations that were dismissed prior to trial — namely, allegations concerning NFL conduct regarding stadium leases, disparagement and game officials. The work done in relation to those allegations was properly included in the fee award because it was related to the same claim upon which the USFL eventually prevailed. That those allegations were dismissed before trial does not necessitate their exclusion from the basis of the fee award. The development of factual allegations and theories to support a claim is part of the normal litigation process and should be compensable.

The same reasoning holds true for the NFL's contentions that the USFL should not receive attorney's fees for work related to "unsuccessful collateral matters," such as attempts to introduce evidence of prior judgments against the NFL and evidence of congressional testimony by NFL personnel. The district court opined that "to the extent that this time was spent on alternative ways to obtain relief for the NFL's illegal monopolization of professional football, it is fully compensable." *United States Football League*, 704 F.Supp.

at 481. We agree. These "collateral issues" all stem from and are related to a common core of facts — the alleged antitrust violations. We have previously held that the evidence of the prior judgments was "at best marginally probative" with respect to the issues in this litigation. *United States Football League*, 842 F.2d at 1372. We also agreed with the Third Circuit's declaration that in this context, legislative process evidence was " 'irrelevant.' " *Id.* at 1375 (quoting *Mid-South Grizzlies v. National Football League,* 720 F.2d 772, 784 (3d Cir. 1983), *cert. denied,* 467 U.S. 1215 (1984)). Thus, time spent by USFL attorneys on these issues is not fully compensable. While the district court did not specifically exclude time spent on these issues, it did reduce the lodestar. Because it was within the district court's discretion to do so, *see Hensley*, 461 U.S. at 436-37, and we see no abuse of that discretion, we will not disturb the fee award because of the inclusion of time spent on these matters.

In sum, because the USFL was successful in proving an antitrust injury, all that is required under section 4 of the Clayton Act, it is entitled to attorney's fees for all work done in relation to the common core of facts that resulted in that injury. The district court correctly included these amounts in the fee award.

2. *Determination of a "Reasonable" Attorney's Fee*

As the Supreme Court emphasized in *Hensley*, "the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. The district court's determination should be overturned only upon a finding of an abuse of that discretion. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 650 (7th Cir. 1985).

In adjusting a lodestar figure, the Fifth Circuit developed a set of factors that may be taken into consideration. Those factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to per-

form the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). As the Supreme Court noted in *Hensley*, in adjusting a fee upward or downward, a "district court . . . may consider . . . factors identified in *Johnson* . . . though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. 434 n.9.

Here, the district court took the *Johnson* factors into consideration in determining a "reasonable" fee. *United States Football League*, 704 F.Supp. at 485 & n.12. Applying the *Johnson* factors, the district court found that the only factor indicating a reduction in the lodestar amount was an evaluation of the results obtained. Focusing on the results obtained as "a crucial factor," *id.* at 485, the district court went on to determine what would be a "reasonable" award given that the USFL did not succeed in proving violations and damages regarding many of its claims.

The district court noted that the USFL exercised billing judgment and in recognition of its limited success, the USFL had already reduced the basic lodestar by twenty percent. According to the district court, the adjusted claimed amount was $7,662,702.13. The USFL also pointed out that it had charged historic billing rates, instead of current rates, and that it had understated the time actually spent on the litigation. Because of the USFL's limited success, the district court "fe[lt] compelled," *id.* at 486, to reduce the amount claimed by the USFL by an additional twenty percent over the ten percent reduction that had previously been imposed

for vagueness in the documentation of certain time entries. The district court believed that the resulting thirty percent reduction "reflect[ed] a 'reasonable' fee under 15 U.S.C. § 15." *Id.* The NFL now challenges the amount of the reduction, claiming that the reduction should have been greater. We decline to modify the amount of the reduction imposed by the district court.

As the amount of an award is within the discretion of the district court, so is the amount of any reduction. The district court considered the relevant factors in determining the amount of the reduction to impose. We find no abuse of discretion and conclude that the amount of the reduction and of the award should stand.

C. *Compensation for Paralegal Time*

The district court awarded $1,042,882.55 in attorney's fees for non-lawyers' services. The NFL argues that the district court erred in declining to follow our decision in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), where we stated that time billed for paralegals and other non-lawyers "cannot be considered as input in the fee award determination." *Id.* at 473. The district court, citing "[v]arious intervening developments in the law, as well as a practical evaluation of the billing practices of law firms," *United States Football League*, 704 F.Supp. at 483, concluded that *Grinnell* was "no longer good law." *Id.* The Supreme Court's recent decision in *Missouri v. Jenkins*, 57 U.S.L.W. 4735 (U.S. June 19, 1989), confirms that the district court's analysis was correct.

In *Jenkins*, which involved the determination of a reasonable attorney's fee under 42 U.S.C. 988, the Supreme Court stated that "[c]learly, a 'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney." *Id.* at 4738. Accordingly, the Court "t[ook] as [its] starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of

paralegals, as well as that of attorneys." *Id.* Thus, without specifically mentioning it, *Jenkins* effectively overruled *Grinnell* on this issue. Paralegals' time is includable in an award of attorney's fees.

After deciding that attorney's fees awards could include time billed by paralegals and other non-lawyers, the Supreme Court in *Jenkins* went on to address "[t]he more difficult question [of] how the work of paralegals is to be valuated in calculating the overall attorney's fee." *Id.* The Court concluded that "the prevailing practice in a given community" is to govern whether paralegals' time is billed separately, and whether it is billed at cost or at market rates. *Id.* at 4739.

The district court did not have the benefit of *Jenkins* when it made its determination regarding paralegals' fees. Therefore, it did not make a finding of fact concerning the prevailing practices in New York law firms for billing paralegals' time. However, an inference that the practice of New York law firms is to bill paralegal time at hourly or market rates may be drawn from the affidavits of Mark E. Segall of Myerson & Kuhn, counsel for the USFL. Regarding the fees for paralegals, Segall stated that, based on his "personal experience and familiarity with the billing rates ordinarily charged by comparable New York City firms for comparable work, the rates at which recovery is sought are reasonable." The evidence that is in the record that the billing rates were reasonable was not controverted by the NFL.

Given the Supreme Court's endorsement of billing at market rates, we hold that the hourly market rate for paralegal services in New York City is includable in the attorney's fees award in this case. We agree that billing for paralegals' time in this manner "makes economic sense," and " 'encourages cost-effective delivery of legal services.' " *Jenkins,* 57 U.S.L.W. at 4739 (quoting *Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985)).

The district court's decision foreshadowed the Supreme Court's decision in *Jenkins*. We are satisfied that the district court would have reached the same conclusion under the *Jenkins* test. Therefore, we see no need to remand for a determination of the prevailing practice in New York law firms for billing paralegals' time. It was neither error nor an abuse of discretion to include paralegals' fees in the attorney's fees award. Consequently, the award will stand.

D. *The Award of Out-of-Pocket Expenses*

The NFL challenges the inclusion of out-of-pocket expenses that were billed directly to the USFL in the award of attorney's fees. However, we have held that attorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients. *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987). The out-of-pocket expenses at issue here were " 'incidental and necessary' to the representation" of the USFL. *Id.* (quoting *Northcross v. Board of Education*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)). Thus, they were properly included in the amount that may be awarded pursuant to Fed. R. Civ. P. 54(d) and 28 U.S.C. 920 (1982).

CONCLUSION

The judgment of the district court is affirmed in its entirety.

APPENDIX B

UNITED STATES FOOTBALL LEAGUE, et al., Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al., Defendants.

No. 84 Civ. 7484 (PKL).

United States District Court,
S.D. New York,

Jan. 19, 1989.

Myerson & Kuhn, New York City (Harvey D. Myerson, Mark E. Segall, of counsel), for plaintiffs.

Skadden, Arps, Slate, Meagher & Flom, New York City (Frank Rothman, Shepard Goldfein, Seth B. Schafler, of counsel), Davis Polk & Wardell, New York City (Robert B. Fiske, of counsel), Covington & Burling, Washington, D.C., for defendants.

OPINION AND ORDER

(Opinion No. 18)

LEISURE, District Judge.

This action was tried over ten weeks in the summer months of 1986. The United States Football League and certain of its member clubs (collectively the "USFL") brought suit against the National Football League, its commissioner and certain of its member clubs (collectively the "NFL") for violations of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2, and of the common law.

At the conclusion of the trial, the jury rendered a series of general verdicts, and answered numerous special interrogatories. Those findings were not disturbed by this Court upon post-trial motions. *U.S. Football League v. National Football League,* 644 F.Supp. 1040 (S.D.N.Y. 1986). The Second

Circuit affirmed. *U.S. Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988). The USFL makes the present application for attorneys' fees.

After trial, the jury found the NFL liable on the USFL's first claim of actual monopolization, concluding that the NFL had willfully acquired or maintained monopoly power in a relevant market consisting of major league professional football in the United States. The jury also found that the NFL's unlawful monopolization of a relevant market had caused injury to plaintiffs' business or property. Despite these findings, the jury chose to award only nominal damages of $1.00 as a result of the NFL's unlawful conduct. *See, generally, USFL*, 644 F.Supp. at 1042; *USFL*, 842 F.2d at 1377.

Plaintiffs were not as successful on their remaining claims. The jury found that the NFL had not violated Section 2 by attempting or conspiring to monopolize. Additionally, although the jury found that one or more of the defendants had participated in a contract, combination or conspiracy to exclude competition within major league football, that combination was found not to be an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Also, the NFL's television contracts were not found to be an unreasonable restraint of trade violative of Section 1, nor did the jury accept the plaintiffs' "essential facilities" claim. *USFL*, 644 F.Supp. at 1042.

The issues presented by this petition basically fall into three categories: 1) the adequacy of the documentation of the fees; 2) whether the USFL should receive attorneys' fees at all; and 3) the proper amount of those fees. Additionally, the NFL contests the costs application of the USFL.

1. DOCUMENTATION OF THE FEES SOUGHT.

The NFL challenges the fee petition because the documentation of the hours spent is alleged to be inadequate. The original computer printouts, which *are* the contemporaneous records, are submitted as Exhibit A, attached to the Affidavit of Mark E. Segall, Esq., sworn to on August 17, 1988 ("Segall

Affidavit"). Those records had previously been re-typed into a more legible form, and attached as Exhibit C to the Affidavit of Harvey D. Myerson, Esq., sworn to on May 2, 1988 ("Myerson Affidavit").[1] The initial submission of the re-typed computer records satisfied the requirement that "contemporaneous" time records be submitted. *Lenihan v. City of New York*, 640 F.Supp. 822, 824 (S.D.N.Y. 1986). "Reconstructed" records, of course, would not be sufficient. Comparison of the re-typed records with the original computer runs subsequently submitted to the Court and opposing counsel indicates, however, that the re-typed printouts are not impermissibly reconstructed. The re-typed format served its purpose, which was to be helpful in this Court's review of the fee application.

The NFL has picked out certain discrepancies between the re-typed records and the original computer runs. It argues that these discrepancies should invalidate any fee award. These claims warrant little discussion; the discrepancies that do exist are few, minor, and in any event largely justified. It is worth noting that the *USFL* submitted the original computer time printouts, as an exhibit, to the Court for analysis; the NFL would have made its comparative challenges without providing the Court a complete record to review.

The NFL complains of isolated instances of alleged deletion of overspecific language, *see,* Exhibit D, attached to Affidavit of Seth B. Schafler, Esq., sworn to on July 14, 1988

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[1] The USFL is currently represented by the law firm of Myerson & Kuhn, which is pursuing this fee application. The USFL was represented at trial by the now dissolved firm of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey ("Finley Kumble"). Harvey D. Myerson, Esq., was lead counsel for plaintiffs at trial, and has personal knowledge of the billing matters at issue in this petition.

At the filing of the application, current USFL counsel no longer had access to the computers where the Finley Kumble billing information was stored. Segall Affidavit ¶ 5. Additionally, records for work done for the USFL on this case by the law firm of Spenglar Carlson Gubar Brodsky & Frischling ("Spenglar Carlson") just prior to this petition were not available. Segall Affidavit ¶ 19. Those actual records are now submitted as Exhibit D, attached to Segall Affidavit.

("Schafler Affidavit "), and inclusion of descriptive language, *see,* Exhibit E, attached to Schafler Affidavit, in the re-typed time sheets. The few instances of inclusion were based on personal knowledge of the attorneys involved. Segall Affidavit ¶ 25. The Court finds that these minor discrepancies in the re-typed time sheets, especially when compared to the full original computer runs submitted to the Court, do not render any part of the fee application invalid.

The documentation of the billed time is also challenged as impermissibly vague. The Second Circuit set out the required specificity in *New York State Ass'n For Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1148 (2d Cir. 1983) (the records "should specify, for each attorney, the date, the hours expended, and the nature of the work done.") "It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974). *See also, Williamsburg Fair Housing Comm. v. Ross-Rodney Housing Corp.*, 599 F.Supp. 509, 517 (S.D.N.Y. 1984); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 170 (3d Cir. 1973).

The timekeeping practices of the USFL's counsel here are consistent with standards prevalent in the legal profession[2] The NFL's claim that 50% of the entries are impermissibly vague is far overstated. The NFL assesses individual entries, and even individual *parts* of entries, as if they were isolated in a vacuum. Upon examination of the time sheets in context, given the Court's familiarity with the case and its "own assessment of what is appropriate for the scope and complexity of the particular litigation," *Carey,* 711 F.2d at 1146, most of the alleged vagueness evanesces.

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[2] *See, e.g.,* Exhibit B to Segall Affidavit. That document is a petition for statutory fees submitted in an unrelated case by Davis Polk & Wardell, one of the law firms currently representing the NFL. That submission, for which full compensation was awarded, is substantially similar in detail to the one submitted by the USFL here.

There are, however, numerous entries that are, in fact, too vague under the *Carey* standard, even when taken in context. While not approaching the 50% figure asserted by the NFL, the Court cannot ascertain whether such entries are properly recoverable or not. Fees cannot, therefore, be properly awarded for those entries. Because of this vagueness, the ultimate fee award will be reduced by 10%. *See, Orshan v. Macchiarola,* 629 F.Supp. 1014 (E.D.N.Y. 1986) (Court reduced fee award by 25% when faced with inadequately reconstructed records that did not distinguish compensable and noncompensable time); *Chrapliwy v. Uniroyal,* 583 F.Supp. 40, 47 (N.D. Ind. 1983) ("[A]mbiguities arising out of poor time records should be resolved against the applicant," and court reduced compensation for 50 hours of undocumented telephone calls by 10%).

2. ENTITLEMENT TO FEES.

The USFL contends that actual entitlement to fees is not, in fact, an issue at all. An award of fees under section 4 of the Clayton Act is "mandatory for prevailing plaintiffs." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 415 n. 5, 98 S.Ct. 694, 697 n. 5, 54 L.Ed.2d 648 (1978). The Second Circuit has reversed a district court for refusing to award fees to a prevailing antitrust plaintiff, noting that "[s]ection 4 of the Clayton Act expressly requires such an award." *Hydrolevel Corp. v. American Soc. of Mechanical Engineers,* 635 F.2d 118, 130 (2d Cir. 1980), *aff'd,* 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982). There are numerous cases where fees to prevailing antitrust plaintiffs are characterized as "mandatory." *See, e.g., Home Placement Service, Inc. v. Providence Journal Co.,* 819 F.2d 1199, 1210 (1st Cir. 1987); *Baughman v. Cooper-Jarrett, Inc.,* 530 F.2d 529, 531 n. 2 (3d Cir.), *cert. denied,* 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976).

The NFL concedes, as it must, that a prevailing antitrust plaintiff is entitled to a mandatory award of attorneys' fees under section 4 of the Clayton Act. The NFL makes the only real argument left to make, namely, that the USFL, despite

the jury's finding on the monopolization claim, was not a "prevailing party."

The NFL thus asserts that the USFL's fee application should be denied in its entirety. The arguments that the USFL was not a "prevailing party" are essentially that: 1) the USFL lost a major portion of its case, and did not achieve all of the benefits it sought to achieve by the litigation; and 2) the USFL did not prove any damage with regard to the claim it prevailed upon.

A. Benefits of the Litigation.

A significant portion of the NFL's "benefits of the litigation" argument is based on language quoted in *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) ("A typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.' ") (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-279 (1st Cir. 1978)). The NFL thus contends that a certain minimum threshold level of "benefits" must be achieved before a party who establishes antitrust violations becomes a prevailing party under the antitrust laws.

Hensley, and all of the other cases relied upon by the NFL in this regard, involve *discretionary* awards of attorneys' fees under provisions like § 1988, and not *mandatory* provisions such as § 4 of the Clayton Act (15 U.S.C. § 15).[3] The appli-

[3] Other § 1988 cases cited by the NFL include, *e.g., Martin v. Heckler,* 773 F.2d 1145 (11th Cir. 1985); *New York City Unemployed & Welfare Council v. Brezenoff,* 742 F.2d 718 (2d Cir. 1984); *Kentucky Ass'n for Retarded Citizens, Inc. v. Conn.,* 718 F.2d 182 (6th Cir. 1983).

The NFL also relies on cases under other discretionary fee awards provisions, similar in this respect to the Civil Rights Attorneys Fees Award Act of 1976. *E.g., Counsel v. Dow,* 849 F.2d 731 (2d Cir.), *cert. denied,* ___ *U.S.* ___, *109 S.Ct. 391, 102 L.Ed.2d 380 (1988) (Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(b)); Martin v.*

cability of those cases to the present issue is therefore limited. The characterization of a party as "prevailing" in a discretionary scheme involves different considerations than a mandatory scheme, in that in the former the Court is required to make an initial decision *whether* an award of fees is appropriate.[4] The differences between mandatory and discretionary fee provisions are significant here.

These differences were implicitly recognized by Congress in its enactment of discretionary fee award schemes. In passing § 1988, for example. Congress intended that the *amount* of attorney's fees awarded should be governed by the same standards as those that apply to antitrust-type litigations. Congress, however, clearly did not, in passing § 1988, adopt the "shall recover" language of 15 U.S.C. § 15. *See,* S.Rep. No. 94-1011, p. 6 (1976), 1976 Cong. & Admin. News, pp. 5908, 5913. The fundamental difference in the initial posture of the fee award inquiry in mandatory and discretionary schemes was thus maintained. The NFL's argument, if accepted, would essentially negate the mandatory language of the Clayton Act fee provision, and subject antitrust plaintiffs to the same discretionary threshold considerations that apply to plaintiffs seeking fees under civil rights, and other discretionary, fee award statutes.

The Supreme Court in *Hensley* itself noted that the "standards set forth in this opinion are generally applicable in all cases in which Congress has *authorized* an award of fees to a prevailing party.' " 461 U.S. at 433 n. 7, 103 S.Ct. at 1939 n. 7 (emphasis supplied). Congress here has not "authorized," but *mandated*, an award of fees. Again, the inquiry into

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Heckler, 773 F.2d 1145 (11th Cir. 1985) (Equal Access to Justice Act, 28 U.S.C. § 2412).

[4] The benefits achieved by the litigation are not, of course, irrelevant in mandatory fee award schemes. Such concerns may have significant effect upon the determination of what a "reasonable" fee is. *See, e.g., City of Riverside v. Rivera,* 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986). *See also,* Part 3 below.

whether there should be an award is fundamentally different under the two types of statutes.

The NFL's characterizations of the goals and benefits of the litigation, *see, e.g.*, NFL's Memorandum of Law in Opposition to Plaintiffs' Petition for Attorneys' Fees and Costs ("NFL Mem."), at pp. 6-22. while perhaps relevant to the Court's determination of a "reasonable" fee, are simply inapposite to a decision whether to award a fee at all.

B. Damages.

The NFL also argues that the USFL did not attempt to prove damages specifically related to the § 2 claim upon which it prevailed, and thus it was not a true "prevailing party." The NFL's arguments here confuse damages with the fact of damage, or injury. Obviously, the USFL did not prove substantial damages in receiving a $1 verdict. The verdict for the USFL necessarily, however, meant that the jury found some injury, as an element of the Sherman Act violation.

The jury in this action was instructed that to find the NFL liable to the USFL for monopolization, in violation of § 2 of the Sherman Act, it had to find that (1) the NFL possessed monopoly power in a relevant market; (2) the NFL knowingly acquired or maintained that power; (3) this power was maintained through anticompetitive conduct; and (4) this conduct *injured* the USFL. *USFL*, 842 F.2d at 1377. The jury expressly found each of these elements, and in a special interrogatory, explicitly stated that it found injury. *USFL*, 644 F.Supp. at 1042.

Section 4 of the Clayton Act provides specifically that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys' fee."

The NFL's entire argument in this regard is based on the erroneous assertion that an award of fees for an antitrust violation requires proof of some threshold level of "damages,"

in addition to the fact of injury. NFL Mem. at 22, n. 2.[5] Such a position would not allow a fee award in *any* case where the plaintiff recovered only nominal damages. The NFL argues that this should be the law,[6] although it concedes that such is not the case. Transcript of Oral Argument, December 14, 1988, at p. 14.

There are a host of cases where nominal damage awards have supported attorney fee awards. *See, e.g., Auwood v. Harry Brandt Booking Office, Inc.*, 647 F.Supp. 1551, 1557 (D.Conn.1986) ("It is beyond dispute that a finding of nominal damages [under the antitrust laws] is sufficient for an award of attorney fees."), *aff'd in part, vacated in part on other grounds,* 850 F.2d 884 (2d Cir.1988); *Home Placement Serv. Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1205-09 (1st Cir.1987).

The NFL attempts to distinguish these cases by asserting that in each of them the plaintiffs attempted to prove damages on the specific claim prevailed upon. This is said to contrast to the present case, where the offered damages proof related only to television claims. The USFL's damages proof, while relating solely to television, did seek generally to establish damages from the unlawful monopolization of professional football. It cannot be said that such proof had no effect on the jury's finding of injury, a finding which was not disturbed on post-trial motion or appellate review. *USFL*, 644 F.Supp. at 1056-58; *USFL*, 842 F.2d at 1376-77.

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[5] A similar and corollary assertion is that an action where substantial damages are not proved is, in effect a "declaratory judgment," and therefore does not support attorney's fees. *See, e.g., Allen-Bradley Co. v. Local Union No. 3,* 51 F.Supp, 36, 40 (S.D.N.Y. 1943), *rev'd,* 145 F.2d 215 (2d. Cir. 1944), *rev'd,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed 1939 (1945).

[6] The cases that the NFL cites for this view do not stand for the proposition that some level of damages are required, but merely that an award of attorneys' fees is not proper where no *injury* is shown. *E.g., Alden-Rochelle, Inc. v. ASCAP,* 80 F.Supp. 888, 899-900 (S.D.N.Y. 1948) ("plaintiffs have not shown any *injury* from defendants' violations of the antitrust laws") (emphasis added).

In any event, the distinction between a plaintiff who does not offer adequate proof of damages on a specific claim, and one who offers proof that is rejected by the factfinder, is not meaningful. In both cases the damages evidence goes solely to the degree of success enjoyed by the plaintiff.[7]

In sum, the jury's finding of injury and an antitrust violation precludes the NFL's arguments that the USFL was not a prevailing party under Section 4 of the Clayton Act. The award of counsel fees itself is therefore a non-issue. A reasonable fee award under the statute is mandatory. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 n. 5, 98 S.Ct. 694, 697 n. 5, 54 L.Ed.2d 648 (1978); *Hydrolevel Corp. v. American Soc. of Mechanical Engineers*, 635 F.2d 118, 130 (2d Cir.1980), *aff'd*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982). The Court must determine what award would be "reasonable."

3. AMOUNT OF THE FEE AWARD.

A. Specific Elements of the Fee Application.

In addition to general objections to an award of attorneys fees at all, the NFL challenges various aspects of the claimed fees as not compensable. These concerns must initially be addressed. For the following reasons, the Court finds the USFL's fee petition essentially proper as a preliminary matter; the fees sought are compensable.

The lawsuit involved claims that the USFL did not prevail upon. If those claims were "distinctly different claims for relief that are based on different facts and legal theories" from those on which plaintiff prevailed, time spent in their pursuit is not compensable. *Hensley v. Eckerhart*, 461 U.S.

[7] By only putting on television damage evidence, the USFL did not in some way "make a deliberate choice" to forgo its Clayton Act remedy, as the NFL claims. In *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), cited by the NFL for this proposition, the plaintiff pursued state law remedies after establishing an antitrust violation and therefore could not get fees under the federal fee shifting statute. The USFL here is most definitely pursuing its federal remedy, including counsel fees.

424, 434, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40 (1983). However, "to the extent that work bore on both a successfully asserted antitrust claim and other, noncompensable claims, that work may be fully taken into account" when awarding fees. *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054, 1057 (S.D.N.Y.1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir.1978). The NFL takes issue with various specific aspects of the fee application.

The USFL based separate claims upon the television-related activities of the NFL; it lost those claims. As this Court has previously indicated, however, it cannot be said that the television evidence was completely distinct, either factually or legally, from the broad monopolization claim that plaintiff prevailed upon. *USFL*, 644 F.Supp. 1040, 1056-58.[8] *Cf., Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940; *Zabkowicz v. West Bend Co.*, 789 F.2d 540, 531 (7th Cir.1986) (claims unrelated where "entirely distinct and separate" courses of conduct involved). The USFL's television evidence cannot be conclusively separated from the jury's definition of a relevant market, its finding of monopoly power in that market, or its conclusion that behavior which the NFL repeatedly described as innocent was in fact intended to stifle competition. As such, the work expended in developing the television evidence will not be excluded wholesale from the fee application. *Kane, supra*, 439 F.Supp. at 1057.

Although Commissioner Rozelle was quite appropriately found by the jury to be not personally liable as a defendant based on evidence in the case, the NFL in its argument incorrectly concludes that all time spent probing his activities and his role as Commissioner is non-compensable. Rozelle was not merely a party defendant, but chief executive officer of the NFL. The time spent investigating and developing the evidence with regard to Rozelle in his capacity as Commissioner of the NFL was therefore essentially related to the

[8] This Court cited record proof set out in the USFL's Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict, at pp. 5-14. That proof included extensive television-related evidence.

successful monopolization claim, and will not be excluded. Again, this Court specifically cited parts of that evidence in denying the NFL's motion for judgment n.o.v. *USFL,* 644 F.Supp. at 1056-58.

The NFL makes vague challenges to various allegedly "collateral" matters, including pre-trial motions involving certain predatory conduct, evidentiary efforts related to prior NFL antitrust litigation, injunctive relief,[9] and lobbying. NFL Mem. at pp. 50-51. As an initial matter, although the NFL had complete access to the original computer runs of the USFL's billable time, and adequate opportunity for a comprehensive review of that material, it has not identified any time devoted exclusively to these allegedly non-compensable activities. *Cf. Blum v. Stenson,* 465 U.S. 886, 892 n. 5, 104 S.Ct. 1541, 1545 n. 5, 79 L.Ed.2d 891 (1984). Additionally, to the extent that this time was spent on alternative ways to obtain relief for the NFL's illegal monopolization of professional football, it is fully compensable. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing the fee. *Hensley,* 461 U.S. at 435, 103 S.Ct. at 1940.

With regard to the other matters termed "collateral," the NFL has similarly failed to identify particular non-compensable time, and makes only general conclusory objections to certain elements of the application. The aggregate of these claims amount to but a small fraction of the fee application, and in any event those aspects are either not actually claimed in the petition, or are fully compensable.

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[9] The NFL's general objection to fees charged for "injunctive relief" is misleading. No time spent on post-trial injunctive motions is being claimed. Affidavit of Harvey D. Myerson, Esq., sworn to on May 2, 1988 ("Myerson Affidavit"), ¶ 10. The few references to injunctive relief occur in preliminary stages of the litigation, when various alternative relief was legitimately being explored.

The NFL makes a general objection to time allegedly spent on a lawsuit by the USFL against the ABC television network. No time spent in prosecuting that lawsuit is actually sought in this position; an entirely different law firm for the USFL was involved. The references to "ABC litigation" in the computer runs and time sheets here refer to the legitimate monitoring of related litigation by the USFL's counsel in this action. Competent representation would require such monitoring, and those time entries are fully compensable.

The USFL successfully defeated a motion by the New Orleans Breakers to intervene in this lawsuit, which kept the lawsuit focused on the issues raised by the USFL, and therefore reduced the fees incurred by *both* sides. Time was also expended, and charged, for the pre-trial decision to drop the Los Angeles Raiders as a defendant. That decision ultimately led to favorable testimony from Al Davis, as a principal in the Los Angeles organization. This Court cannot say that these activities did not positively affect the success of the USFL at trial. *Kelley v. Metropolitan County Bd. of Education,* 558 F.Supp. 468, 476 (M.D. Tenn. 1983), *aff'd in relevant part, rev'd in part on other grounds,* 773 F.2d 677 (6th Cir.1985), *cert. denied,* 474 U.S. 1083, 106 S.Ct. 853, 88 L.Ed.2d 893 (1986).

The substantial public interest in this case required counsel to deal extensively with the media. The nature of the lawsuit necessitated this activity; the comparatively few hours spent on required media relations are fully compensable, *Dick v. Watonwan County,* 562 F.Supp. 1083, 1109 (D.Minn.1983), *rev'd in part on other grounds,* 738 F.2d 939 (8th Cir.1984).

The NFL objects to the inclusion of charges for travel time, but does not dispute that such time was necessary or that it was billed. The Court notes that the USFL retained New York counsel for the New York litigation. The law and the realities of legal practice reflect the correctness of the inclusion of travel time here.

> When a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling. That is why lawyers invariably charge their clients for travel time. . . . And if they charge their paying clients for travel time they are entitled to charge the defendants for that time in a case such as this where the plaintiffs have shown a statutory right to reasonable attorneys' fees.

Henry v. Webermeier, 738 F.2d 188, 194 (7th Cir.1984). Of course travel time not normally billed to clients, for example by public interest law groups, should not be awarded, as it would provide a windfall for the prevailing party. *See, Thomas v. Board of Educ.,* 505 F.Supp. 102, 104 (N.D.N.Y.1981). This is not the case here; travel time is properly includable.

The NFL raises another general objection to claimed fees for the USFL's successful motion to disqualify a law firm initially retained by the NFL. There are two points worth noting here. First, much of the time spent on that motion is *not* being claimed in this petition, in that it was performed by the USFL's prior counsel. Second, it is ironic that the NFL complains about fees incurred as a direct result of its own retention of the law firm that helped structure the USFL at its formation. Those incidental fees relating to the disqualification motion are compensable.

The NFL contests the alleged inclusion of "Oakland" time in the fee application. There was a separate litigation instituted by the USFL in Oakland, and time spent exclusively on that litigation is concededly not compensable. The NFL asserts that such time remains in the fee application. The Court disagrees. A meticulous review of the Oakland-related time was undertaken prior to the filing of this petition. Segall Affidavit, ¶ 22. Over 150 entries, representing 550 hours of time relating to that separate litigation, were deleted from the fee request. Additionally, certain compensable time was deleted because it was inextricable from time spent on the Oakland litigation, *see,* Exhibit E, attached to Segall Affidavit, and other "mixed" time was reduced, *see,* Exhibit F.

Schafler Affidavit. The time remaining properly refers to Oakland-related matters that were relevant to this trial, and to the monopolization claim that the USFL prevailed upon. The conspiracy regarding the City of Oakland was cited by this Court as a particularly persuasive example of predatory behavior by the NFL. *USFL,* 644 F.Supp. at 1058. Upon review of the submitted time records, the Court is satisfied that the remaining entries are compensable, and the mere mention of the word "Oakland" does not render any particular entry non-compensable.

The NFL contests $1,042,882.55 of the fee application, in that that sum reflects time billed for work by paralegals, summer associates, and other non-lawyer personnel. Such exclusion is consistent with the decision of *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974), where the Court held that only the costs of providing such services may be recovered. Various intervening developments in the law, as well as a practical evaluation of the billing practices of law firms, lead this Court to conclude that *City of Detroit* is no longer good law, and the fees charged for non-legal personnel should be recoverable.

Since *City of Detroit,* Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. As previously noted, Congress intended that the amount of fees awarded be governed by the same standards as other complex federal litigation, such as antitrust cases.[10] The Senate Report to that bill cited cases that had "correctly applied" these standards S.Rep. No. 94-1011, p. 6 (1976), 1976 U.S. Code Cong. & Admin.News at 5913. One of those cases, *Davis v. County of Los Angeles.* 8 Empl.Prac.Dec. (CCH) P9444 (C.D.Cal.1974) specifically included an award of fees at $10/hour for work performed by paralegals. Additionally, the Supreme Court in *City of Riverside v. Rivera,* 477 U.S. 561, 565-66 n. 2, 106 S.Ct. 2686, 2690 n. 2, 91 L.Ed.2d 466 (1986) affirmed an award of $25/hour for time spent by non-lawyers.

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[10] *McCann v. Coughlin,* 698 F.2d 112, 129 (2d.Cir.1983).

In addition to the legislative history of § 1988 and the result in *City of Riverside,* numerous cases, many in the antitrust context, have held non-lawyer based fees to be recoverable. *See, e.g. Morgan v. District of Columbia,* 824 F.2d 1049, 1067 (D.C. Cir.1987); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.,* 776 F.2d 646, 653-54 (7th Cir.1985); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1210 n. 19 (9th Cir.1975), *cert. denied.* 425 U.S. 959, 96 S.Ct. 1741; 48 L.Ed.2d 204 (1976); *Pickman v. Dole,* 671 F.Supp. 982, 990 (S.D.N.Y.1987); *Lenihan v. City of New York,* 640 F.Supp. 822, 828 (S.D.N.Y.1986); *Litton Systems, Inc. v. American Tel. & Tel. Co.,* 613 F.Supp. 824, 833 (S.D. N.Y.1985); *Mid-Hudson Legal Services v. G & U, Inc.,* 465 F.Supp. 261, 273 n. 12, 174 n. 16 (S.D.N.Y.1978)

As a simple matter of economics, it is desirable to reduce the cost of litigation by encouraging the utilization of less expensive non-lawyer personnel where possible. There is no windfall, the USFL counsel billed the client at the non-lawyer rates it is seeking. To deny recovery of those fees would perversely provide incentive to use and bill more expensive attorney time, whenever possible. "To the extent that such work is done by non-lawyers at lower time rates than would have been the case had the work been done by lawyers, the losing party benefits and has little cause to complain." *Selzer v. Berkowitz,* 477 F.Supp. 686, 690 n. 3 (F.D.N.Y.1979).

Finally, with regard to the amount recoverable under § 4 of the Clayton Act, the NFL contests the expenses (which it terms "costs") that were billed directly to the client, and thus not included in counsels' overhead. The rule is that such fees *are* recoverable, notwithstanding that they were billed to the client separately. *Reichman v. Bonsignore, Brignati, & Mazzotta P.C.,* 818 F.2d 278, 283 (2d Cir.1987) (awards "normally include those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients") (citation omitted). *See also, Dominic v. Consolidated Edison Co.,* 652 F.Supp. 815, 822 (S.D.N.Y.1986), *aff'd,* 822 F.2d 1249 (2d Cir.1987); *Cool v. Police Department*

of City of Yonkers, 620 F.Supp. 954, 956-57 (S.D.N.Y. 1985); *In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1296, 1314 (E.D.N.Y.1985), *aff'd in pertinent part,* 818 F.2d 226 (2d Cir.1987); *Williamsburg Fair Housing Comm. v. Ross-Rodney Housing Corp.,* 599 F.Supp. 509, 522 (S.D.N.Y.1984). *But see, Litton Sys., Inc. v. AT & T Co.,* 613 F.Supp. 824, 836 (S.D.N.Y.1985).[11]

The rationale behind the rules is plain, and was explained in *Henry v. Webermeir,* 738 F.2d 188, 192 (7th Cir.1984).

> [T]he line between fees and expenses is arbitrary. A lawyer's hourly billing rate includes many overheard expenses such as local telephone calls. It is impossible to believe that Congress would have wanted prevailing parties to get back their local telephone expenses (invariably included in the hourly fee) but not their long distance expenses (invariably billed separately); or get back their secretarial expenses – which are included in overheard and therefore are billed as part of the lawyers hourly rate rather than separately – but not the expenses of word processing, often billed separately to the client.

See also, Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 30 (D.C. Cir.1984), *cert. denied,* 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985); *Palmigiano v. Garrahy,* 707 F.2d 636, 637 (1st Cir.1983); *Dowdell v. City of Apopka,* 698 F.2d 1181,

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[11] Certain pre-*Reichman* cases in this Circuit have properly rejected attempts to recoup expenses billed to clients under the "cost of suit" provision, but not the attorneys' fee provision, of 15 U.S.C. §15. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). The federal costs statute applies equally to actions *not* brought under fee shifting provisions. No problem arises where such expenses are recovered as part of a fee shifting statute. As the cases noted above illustrate, the denomination of these billed expenses as recoverable fees is eminently sensible, and indicated by the law in this Circuit. The USFL should not be penalized for billing expenses directly, instead of raising its hourly rates (which have not been challenged) to cover the expenses as overhead.

Again, the standards under civil rights fee provisions and 15 U.S.C. §15 are the same with respect to the amounts awarded. See n. 10, supra.

1188-92 (11th Cir.1983); *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 639 (6th Cir.1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *Wheeler v. Durham City Board of Education,* 585 F.2d 618, 623-24 (4th Cir.1978).

The sums directly billed to the USFL are substantial; they constitute over one million dollars of the claimed fees. In accord with the authorities noted above however, there is nothing about the nature of those claimed fees that renders them non-recoverable.

B. A Reasonable Fee.

Determination that the gross requested fees do not make claims for non-compensable time is only the first step in the assessment of a reasonable fee. The USFL correctly notes that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stevenson,* 465 U.S. 886, 888, 104 S.Ct. 1541, 1544, 79 L.Ed.2d 891 (1984). The NFL has *not* challenged the reasonableness of the hourly rates charged by the USFL, or asserted that the time expended on any specific element of the litigation was not reasonably spent.

The legitimate issues in this application involve reduction of the basic lodestar fee, to reflect a "reasonable" amount. The USFL has allegedly already made a 20% reduction in that loadstar amount, in the exercise of "billing judgment."

There is a presumption that a lodestar-calculated fee is "reasonable" *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). The burden of establishing that a reduction is proper is on the moving party. *Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 118 (3d Cir.1976); *Copeland v. Marshall,* 641 F.2d 880, 892 (D.C.Cir.1980) (en banc).

The amount of fees under §4 of the Clayton Act rests within the sound discretion of the Court. *Montague & Co. v. Lowry,* 193 U.S. 38, 48, 24 S.Ct. 307, 310, 48 L.Ed. 608 (1904). An award of only nominal damages is a element to be considered, but "this does not mean that the fee award may also be nominal.' " *Home Placement Service, Inc. v. Providence Journal Co.,* 819 F.2d 1199, 1210 (1st Cir.1987) (citation omitted). *Some* reduction of the gross lodestar amount is undoubtedly proper in this case, given the limited success of the USFL, and its recovery of only nominal damages. *Hensley v. Eckerhart,* 461 U.S. at 430 n. 3. 103 S.Ct. at 1937 n. 3; *Friends of the Earth v. Eastman Kodak Co.,* 834 F.2d 295 (2d Cir.1987)

Consideration of the relevant factors in determination of a "reasonable" fee, however, at least partially supports the USFL's contention that the full amount requested is itself reasonable.[12] It is not seriously disputed that the time and labor required, the novelty and difficulty of the issues, the skill required of counsel, comparison with customary fees, time limits imposed by circumstances and experience, reputation and ability of counsel all point strongly to a maximum award. This was an extremely complex action involving

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[12] The factors properly considered in determining a reasonable *amount* of attorneys fees are the same for discretionary schemes like § 1988 and mandatory schemes like 15 U.S.C. § 15. *McCann v. Coughlin,* 698 F.2d 112, 129 (2d Cir.1983). Those factors were set out by Congress and quoted in *Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. at 1937 n. 3 They are:

1. time and labor required
2. novelty and difficulty of the questions
3. skill required to perform the legal service properly
4. preclusion of attorney's employment due to acceptance of the case
5. customary fee
6. whether fee is fixed or contingent
7. time limitations imposed by client or circumstances
8. amount involved and results obtained
9. experience, reputation and ability of attorneys
10. "undesirability" of the case
11. nature and length of the professional relationship with the client
12. awards in similar cases.

unique issues, even within the realm of modern antitrust law. The litigation proceeded at a breakneck pace, as required by the Court's scheduling orders. What might have been several years of discovery was compressed into but a few months, and the result was a jury verdict within fifteen months after the filing of the complaint. Any review of the actual conduct and legal output of the USFL's counsel throughout the hotly contested litigation clearly supports a maximum fee recovery.

The single factor militating a reduction of the lodestar amount, to reflect a reasonable fee, is evaluation of the results obtained. *Hensley,* 461 U.S. at 436, 103 S.Ct. at 1941 ("the most critical factor is the degree of success obtained"). In the present case this is a crucial factor. As the NFL notes, the USFL did not succeed on the heart of its case, namely proving substantial damages and specific antitrust violations related to television. In the context of the antitrust laws, and their enforcement by private attorneys general, this case was not the sort of clear-cut victory that unequivocally justifies a full fee, to verify and further the purposes of the antitrust provisions.

The ambiguous inferences that might be drawn from the jury's verdict are not, however, as severe as the NFL claims. The NFL ignores the fact that it was decisively, unquestionably, found to have violated the antitrust laws. Instead the NFL speculates, and impugns, the veracity and motivations behind the lawsuit. The NFL then argues that a "reasonable" fee cannot be more than one dollar.

This extreme position must be rejected. The NFL cites, as support, cases where courts have rejected fee applications under discretionary fee shifting schemes. *See, e.g., New York City Unemployed v. Brezenoff,* 742 F.2d 718 (2d Cir.1984). In those cases, the Court never considered what amount a "reasonable" fee should be, because discretion was exer-

cised to find that the party had not prevailed.[13] That discretion, as noted above, is not present here.

The NFL also cites *City of Riverside v. Rivera,* 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) for the proposition that the amount recovered, in an action that was instituted primarily to recover damages, is a critical element in fixing a reasonable attorney fee award. *Id.* 477 U.S. at 585, 106 S.Ct. at 2700 (Powell, J. concurring). That general proposition is unproblematic. In *Rivera* itself, however the Supreme Court affirmed a fee award of $245,456.25. That sum represented *full* compensation for *every single hour* spent on the litigation, in a case where (1) seventeen of 32 defendants were granted summary judgment years before trial; (2) nine of the remaining 15 defendants prevailed at trial; (3) plaintiffs obtained no injunctive or structural relief; and (4) the damage recovery was a fraction of the attorneys fees awarded. *Rivera* clearly cannot mandate a "reasonable" fee of one dollar in this litigation.

C. The Fee Award.

As to the actual award, it is clear from the above discussion that some reduction in the basic lodestar amount is mandated by the limited success of the USFL. Although the specific challenges to the compensability of various aspects of the petition discussed above are meritless, a full lodestar-calculated fee represents too large an award given the circumstances of this litigation. The Court now turns to the consideration of what a "reasonable" fee should be in this case.

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[13] The other cases cited by the NFL do not indicate that a nominal "reasonable" fee is mandated in this case. In *Murarescu v. Amoco Oil,* 648 F.Supp. 347 (E.D.Pa.1986), the fees were requested under a statute, 15 U.S.C. § 2805(d), which explicitly authorizes the District Court to deny fees to plaintiffs who only recover nominal damages. *Diver v. Goddard Mem. Hospital,* 783 F.2d 6 (1st Cir.1986), was merely an affirmance of the district court's insubstantial fee award, made after application of *Hensley* factors, including the fact that liability was conceded on the only claim "prevailed" upon.

The USFL asserts that it has already reduced the basic lodestar amount by 20% ($1,953,320.08) in the exercise of billing judgment, and in recognition of its limited success. The adjusted claimed amount, through April 29, 1988, is $7,662,702.13. This reduction is said to reflect the "limited success" factor.

In addition to this percentage reduction, the USFL asserts that it made further reductions in that it: (1) charged historic billing rates, instead of the current rates it says it would be entitled to under *New York Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1154 (2d Cir.1983);[14] and 2) USFL counsel understated time actually spent on the litigation.

The NFL challenges the authenticity of these voluntary reductions. The Court, however, is satisfied that a significant amount of clearly compensable time, as well as some of the more questionable entries were eliminated from the fee application. The result, as noted above, is an application that is basically proper on its face, and which is somewhat lower than it legitimately could have been.

The case of *Knutson v. Daily Review, Inc.,* 479 F.Supp. 1263 (N.D.Cal.1979) is somewhat instructive. That case, like this one, involved a complex antitrust action where liability was established, but only nominal damages were awarded. The court there felt that a downward adjustment of 25% of the lodestar amount was "mandated." *Id.* at 1279, in order that the fees awarded reflect some relation to the award.

This Court likewise feels compelled, under the law as stated in *Hensley,* 461 U.S. at 436, 103 S.Ct. at 1941, and *Friends of the Earth v. Eastman Kodak Co.,* 834 F.2d 295, 298 (2d Cir.1987) and as described in Part 2.B, above, to further reduce the amount claimed by the USFL. That claimed amount (minus that portion expended on this fee petition itself– see Part 3.D below) will therefore be reduced by 20% to reflect a "reasonable" fee under 15 U.S.C. § 15. Together with the

[14] *But see, Richards v. NYC Board of Education,* No. 83 Civ. 7621 (S.D.N.Y., June 27, 1988) (Motley, J.) [1988 WL 70209].

10% reduction for those time entries that are impermissibly vague under the standards of this Circuit, the reduced fees for the litigation of the main action total $5,271,504.55.

D. The Fee Petition.

Implicit in the NFL's rejected challenge to the amount of fees sought, and assertion that a "reasonable" amount would be $1, is the argument that the USFL is not entitled to fees incurred in preparing this petition. This is contrary to settled law in this Circuit. *Gayne v. Maher,* 594 F.2d 336, 343-44 (2d Cir.1979), *aff'd,* 448 U.S. 122, 100 S.Ct.2570, 65 L.Ed.2d 663 (1980); *Litton Systems, Inc. v. A T & T Co.,* 613 F.Supp. 824, 832 (S.D.N.Y.). The USFL quite "reasonably believed that its application would be hotly contested and spent considerable time making the necessary preparations . . . [the opposing party] will not be heard to complain now of inefficencies for which it was in significant part responsible." *Litton,* 613 F.Supp. at 832.

The time required to document and prepare the fee application is unrelated to the success on the merits, and the amount spent on the petition will therefore *not* be reduced by the 20% factor reflecting that lack of success. *See, Williamsburg Fair Housing Comm. v. Ross-Rodney Housing Corp.,* 599 F.Supp. 509, 521 n.12 (S.D.N.Y. 1984); *Ross v. Saltmarsh,* 521 F.Supp. 753, 64 n. 52 (S.D.N.Y. 1981), *aff'd without opinion,* 688 F.2d Cir.1982).[15] As of April 29, 1988, the total fees and expenses incurred amount to $131,988.34. From April 29 through September 30, 1988, fees and recoverable expenses totalled $111,797.92. Affidavit of Mark E. Segall, Esq., sworn to on October 18, 1988 ("Supplemental Segall Affidavit"). The aggregate award for fees expended in pursuing this petition thus far is, then, $243,786.26.

That amount will be added to the adjusted amount of $5,271,504.55, for a total fee award of $5,515,290.87.

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[15] Because the time entries regarding the fee applications do not suffer the same vagueness problems as the records for the case in chief, the 10% reduction for those ambiguities will likewise not be deducted from the hours claimed for the fee petition.

The USFL has reserved an opportunity to submit a final affidavit, detailing the fees incurred in the argument of this motion. That application will be submitted within 30 days of the issuance of this opinion. It will be reviewed by this Court, and an additional award, if proper, will issue for the fees so incurred.

E. Statutory Costs.

The NFL specifically[16] challenges one element of the $62,220.92 costs application that the USFL made under Fed.R.Civ.P. 54(d) and Local Civil Rule 11. The challenged costs relate to transcripts of certain depositions taken prior to trial. Local Civil Rule 11 states that "(c)osts for depositions taken solely for discovery or used only for impeachment purposes are not taxable," and explicitly provides that costs are to be awarded for depositions introduced at trial or cited in summary judgment rulings.

Section 1920(2) of Title 28, U.S.C., authorizes a judge or clerk to tax costs "for all or any part of the stenographic transcript necessarily obtained for use in the case." *See, e.g., Electronic Specialty Co. v. International Controls Corp.,* 47 F.R.D. 158, 162 (S.D.N.Y.1969) (recovery of costs proper for deposition which "appeared to be reasonably necessary to the parties in light of a particular situation existing *at the time it was taken.")* (emphasis added); *Brager & Co. v. Leumi Securities Corp.,* 530 F.Supp. 1361) (S.D.N.Y.), *aff'd,* 697 F.2d 288 (2d Cir.1982). The relevant time period for the "necessary" determination is thus at the time the deposition was taken, and the USFL argues that it is in that context that the "taken solely for discovery" inquiry of Local Civil Rule 11 must occur.

The deposition transcripts for which the USFL seeks reimbursement would certainly have been deemed "necessary" at the time they were taken. The Court finds that in this case

[16] The NFL's general contentions that no fees at all should be rewarded, because the USFL was not a "prevailing party," are also asserted with regard to the statutory costs. For the reasons stated in this opinion, *see* Part 2, above, those arguments are without merit.

those depositions were not taken solely for discovery or impeachment purposes. Under the NFL's unsupported interpretation of the rules, the deposition of Commissioner Rozelle, whose trial testimony took a full week and was repeatedly cited by this Court in the denial of the judgment n.o.v. motions, would not have been "necessary" enough to be taxed.

Costs for all of the depositions taken by the USFL during the abbreviated, hectic discovery phase in this case qualify under the applicable standard, and those costs will be assessed. The full amount of $62,220.92, including the $42,679.71 in deposition transcript costs, are taxable.

CONCLUSION

The USFL is awarded $5,515,290.81 in attorneys fees. The USFL has reserved the right to submit additional affidavits concerning fees incurred during the argument of this petition; those additional applications will be made within 30 days of the issuance of this opinion. Additionally, the USFL's $62,220.92 costs motion is granted.

SO ORDERED.

APPENDIX C

UNITED STATES FOOTBALL LEAGUE, Arizona Outlaws, Baltimore Stars Football Associates, Birmingham Stallions, Ltd., Chicago USFL Limited Partnership, Chicago Football Franchise Limited Partnership, Denver Gold Sports, Inc., Houston Gamblers Ltd., IMI Express, Inc., Jax Professionals, Inc., LAEFC, Ltd., Memphis Showboats, Ltd., Football Generals, Inc., Bay Area Football Partners Ltd., Breakers Limited Partnership, South Texas Sports, Inc., and Orlando Football Partners, Inc., Plaintiffs-Appellants, Cross-Appellees,

v.

NATIONAL FOOTBALL LEAGUE, the Five Smiths, Inc., Indianapolis Colts, Inc., Buffalo Bills, Inc., Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns, Inc., Dallas Cowboys Football Club, Inc., Rocky Mountain Empire Sports, Inc., the Detroit Lions, Inc., Green Bay Packers, Inc., Houston Oilers Inc., Los Angeles Rams Football Company, Minnesota Vikings Football Club, Inc., New England Patriots Football Club, Inc., New Orleans Saints Louisiana Partnership, New York Football Giants, Inc., New York Jets Football Club Inc., the Philadelphia Eagles Football Club, Pittsburgh Steelers Sports, Inc., St. Louis Football Cardinals Co., Chargers Football Company, San Francisco Forty-Niners, Ltd., Tampa Bay Area NFL Football, Inc., Pro-Football Inc., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Seattle Professional Football and Alvin R. Rozelle, individually and as Commissioner of the National Football League, Defendants-Appellees, Cross-Appellants,

Nos. 1189, 1430, Dockets
87-7137, 87-7271.

United States Court of Appeals,
Second Circuit.

Argued June 22, 1987.
Decided March 10, 1988.

Harvey D. Myerson, New York City (Lloyd S. Clareman, Arthur H. Ruegger, Mark E. Segall, Daniel J. Cooper, Douglas R. Pappas, Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, New York City, of counsel), for plaintiffs-appellants, cross-appellees.

Frank Rothman, and Robert B. Fiske, Jr., New York City (William H. Mulligan, Barry H. Garfinkel, Shepard Goldfein, Douglas B. Alder, Seth B. Schafler, Michael H. Roffer, Deborah A. Garza, Skadden, Arps, Slate, Meagher & Flom, and L. Gordon Harriss, Robert M. Buschmann, Davis Polk & Wardwell, New York City, John Vanderstar, Paul J. Tagliabue, L. Jeffrey Pash, Covington & Burling, Washington, D.C., of counsel), for defendants-appellees, cross-appellants.

Before CARDAMONE, PIERCE and WINTER, Circuit Judges.

WINTER, Circuit Judge:

This appeal follows a highly publicized trial and jury verdict of $1.00. The plaintiff is a now-defunct professional football league that began play in this decade; the defendant is a football league founded nearly seventy years ago. The older of the two leagues, the National Football League, is a highly successful entertainment product. So many Americans watched NFL games between 1982 and 1986 that its twenty-eight teams shared $2.1 billion in rights fees from the three major television networks, and perhaps as much as $1 billion in gate receipts. The newer league, the United States Football League, began play in March 1983 with twelve teams and network and cable television contracts with the American Broadcasting Company ("ABC") and the Entertainment and Sports Programming Network ("ESPN"). After three seasons and losses in the neighborhood of $200 million, the USFL played its last game in July 1985. Meanwhile, in October, 1984, blaming its older competitor for its difficulties, the USFL instituted this litigation. Plans to play in the fall of 1986 were abandoned after the jury's verdict that is the principal subject of this appeal.

The USFL and certain of its member clubs[1] brought this suit in the Southern District of New York against the NFL, its commissioner, Alvin R. "Pete" Rozelle, and twenty-seven of its twenty-eight member clubs.[2] Seeking damages of $1.701 billion[3] and appropriate injunctive relief, the USFL alleged that the NFL violated Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§1 and 2 (1982), and the common law. Forty-eight days of trial before Judge Leisure produced a trial transcript of nearly 7100 pages and thousands of additional pages in exhibits.

After five days of deliberations, the jury found that the NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States. The jury also found that the NFL's unlawful monopolization of professional football had injured the USFL.[4] The jury awarded the USFL only $1.00 in damages, however, an amount that, even when trebled, was no consolation for the USFL.

The jury rejected the remainder of the USFL's claims. It found that the NFL had neither monopolized a relevant television submarket nor attempted to do so; that the NFL did not commit any overt act in furtherance of a conspiracy to monopolize; that the NFL did not engage in a conspiracy in restraint of trade; that the NFL's television contracts were not unreasonable restraints of trade; that the NFL did not control access to the three major television networks; and

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[1] The Tampa Bay franchise withdrew as a plaintiff at the time of the filing of the First Amended Complaint. The Arizona Outlaws have withdrawn their appeal.

[2] The Los Angeles Raiders, Ltd., were not named as defendants in this action.

[3] The complaint requested that "the Court award the plaintiffs threefold the amount of actual damages, not less than $440,000,000 in the aggregate ($1,320,000,000 when trebled);" in the joint pretrial order, plaintiffs sought "threefold the amount of actual damages in excess of $567,000,000 in the aggregate (in excess of $1,700,000,000 when trebled)."

[4] NFL Commissioner Rozelle was not found personally liable on the USFL's monopolization claim.

that the NFL did not interfere either with the USFL's ability to obtain a fall television contract or with its spring television contracts. The USFL's common law claims were also rejected.

Judge Leisure denied the USFL's motions for judgment notwithstanding the verdict on its claims of monopolization of the television submarket, attempted monopolization, unreasonable restraint of trade by means of the network television contracts and essential facilities, and for a new trial on damages on the monopolization of professional football claim, or in the alternative for a new trial. *United States Football League v. National Football League,* 644 F.Supp. 1040 (S.D.N.Y. 1986) (*"Opinion No. 16"*). The district court also denied the USFL's request for injunctive relief.

On this appeal, the USFL claims that a "litany of erroneous opinions, rulings and instructions" by Judge Leisure resulted in a "verdict of confusion" that "sent one of the most egregious violators in the history of the federal antitrust laws on its way with a pat on the back." USFL Br. at 3-4. Specifically, the USFL contends that the NFL could not legally enter into a pooled-rights agreement with all three networks; that Judge Leisure's jury instructions "destroyed" the effectiveness of the USFL's proof of its television claims and set improperly high standards of liability; that he improperly allowed the NFL to introduce evidence that the USFL was mismanaged; that he excluded other evidence critical to establishing the USFL's claims; and that his incorrect rulings and instructions on damages prevented the USFL from receiving appropriate relief. We affirm.

SUMMARY

We briefly summarize our principal rulings. The jury's finding of illegal monopolization of a market of major-league professional football was based upon evidence of NFL attempts to co-opt USFL owners, an NFL Supplemental Draft of USFL players, an NFL roster increase, and NFL conduct directed at particular USFL franchises. These activities,

however, were hardly of sufficient impact to support a large damages verdict or to justify sweeping injunctive relief. For that reason, the USFL candidly admits that "at the heart of this case" are its claims that the NFL, by contracting with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival. The jury expressly rejected the television claims.

The jury was clearly entitled by the evidence to find that the NFL's fall contracts with the three networks were not an anticompetitive barrier to the USFL's bidding against the NFL to acquire a network contract. Moreover, there was ample evidence that the USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league. In particular, there was evidence that the USFL abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring. The original plan to contain costs by adherence to team salary guidelines was discarded from the start. Faced with rising costs and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available. Plans for a fall season were therefore announced, thereby making 1985 spring play a "lame-duck" season. These actions were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation. The merger strategy, however, required that USFL franchises move out of large television markets and into likely NFL expansion cities. Because these moves further eroded fan loyalty and reduced the value of USFL games to television, the USFL thereby ended by its own hand any chance of a network contract.

Notwithstanding the jury's evident conclusions that the USFL's product was not appealing largely for reasons of the USFL's own doing and that the networks chose freely not to purchase it, the USFL asks us to grant sweeping injunctive relief that will reward its impatience and self-destructive con-

duct with a fall network contract. It thus seeks through court decree the success it failed to achieve among football fans. Absent a showing of some unlawful harm to competition, we cannot prevent a network from showing NFL games, in the hope that the network and fans will turn to the USFL. The Sherman Act does not outlaw an industry structure simply because it prevents competitors from achieving immediate parity. This is particularly so in the case of major-league professional football because Congress authorized a merger of the two leagues existing in 1966 and thus created the industry structure in question.

THE TRIAL

1. *The Parties' Contentions*

The USFL contended at trial that the NFL maintained a monopoly in the market for major league professional football and in a submarket for the network broadcasting rights to such football by the following allegedly predatory tactics:

a. Signing multiyear contracts with the three major television networks;

b. Pressuring the major networks to abstain from televising USFL games in the spring or fall, and successfully preventing any network telecasts of the USFL in the fall, by threatening not to renew NFL contracts or by assigning unattractive NFL games under existing contracts;

c. Establishing contracts with the networks for artificially high rights fees that, because of the so-called "dilution effect" on demand for advertising during NFL games, precluded network broadcasts of the USFL;

d. Seeking to prevent any of the three major networks from signing a contract for the USFL's initial 1983 spring playing season;

e. Rotating the Super Bowl among the three networks and not submitting the Super Bowl, playoff and even regular-season television rights to competitive bidding;

f. Pursuing a strategy outlined in the so-called "Porter Presentation" to "conquer" and bankrupt the USFL, including: co-opting powerful USFL owners, such as Donald Trump and Alfred Taubman, by offering them NFL franchises; encouraging ABC not to continue USFL broadcasts; pressuring ABC by giving it an unattractive schedule for its *Monday Night Football* program in 1984; targeting important USFL players for signing with the NFL through means such as the NFL's Supplemental Draft and expanded roster; and attempting to bankrupt the weakest USFL teams by driving up USFL player salaries in order to diminish the USFL's size and credibility;

g. Collaborating with the City of Oakland to destroy the Oakland Invaders of the USFL in order to hurt the credibility and image of the Invaders and the entire USFL;

h. Threatening to move an existing NFL franchise or to create a new NFL franchise solely to injure the USFL franchise in Oakland; and

i. Attempting to preclude the USFL's New Jersey Generals from moving to New York City.

The NFL contended that the relevant television submarket included entertainment broadcasting generally and that it had not monopolized either the market for major league professional football or the television submarket because:

a. Its contracts with the three major networks were not exclusionary;

b. The USFL's failure to secure a fall network contract was the result of the independent judgment of each network that the USFL was an inferior product, and of the USFL's self-destructive strategy of forcing a merger with the NFL;

c. It never pressured a network by threatening non-renewal or by assigning a schedule of unattractive games;

d. It never undertook the strategy outlined in the Porter Presentation;

e. It never sought to injure the USFL's Oakland franchise or to preclude the New Jersey Generals from playing in New York City; and

f. The losses suffered by the USFL were due to its own mismanagement.

2. *The History of Major-League Professional Football*

The NFL is an unincorporated association presently consisting of twenty-eight independent, for-profit football clubs. It was founded in 1920 in a Canton, Ohio Hupmobile showroom under the name American Professional Football Association. In 1922, it changed its name to the National Football League. The original teams were the Akron Pros, the Canton Bulldogs, the Cleveland Indians, the Dayton Triangles, the Decatur Staleys, the Hammond Pros, the Massillon Tigers, the Muncie Flyers, the Rock Island Independents and the Rochester Jeffersons, although Massillon and Muncie never played any games. By 1926, the NFL had grown to twenty-two franchises. By 1931, it had shrunk back to ten. The first championship game was not played until 1933. The first NFL draft of college players took place in 1935. All NFL teams played the same number of games for the first time in 1936. As late as 1952, NFL teams encountered bankruptcy. Indeed, NFL Commissioner Rozelle once testified that "41 franchises failed in the first 41 years of the League's existence." Transcript of Proceedings at 55, *United States v. National Football League,* No. 12808 (E.D.Pa. July 27, 1961).

A competing league, the All-America Football Conference ("AAFC"), was organized in 1945 and operated for four seasons with teams in Brooklyn, Buffalo, Chicago, Cleveland, Los Angeles, Miami, New York and San Francisco. *American Football League v. National Football League,* 205

F.Supp. 60, 65 (D.Md.1962) ("*AFL v. NFL*"), *aff'd*, 323 F.2d 124 (4th Cir.1963). Baltimore replaced Miami in 1947, and after the 1948 season, the Brooklyn team merged with the New York team. *Id.* The AAFC ceased operations in 1949 when the Baltimore, Cleveland and San Francisco teams were absorbed by the NFL, raising the number of its teams to thirteen. *Id.* Shortly thereafter, that number was reduced to twelve, where it remained until 1960. *Id.* The NFL's twelve teams were the Baltimore Colts, Chicago Bears, Chicago (later St. Louis) Cardinals, Cleveland Browns, Detroit Lions, Green Bay Packers, Los Angeles Rams, New York Giants, Philadelphia Eagles, Pittsburgh Steelers, San Francisco Forty-Niners and Washington Redskins. *Id.* at 62. The Dallas Cowboys, Minnesota Vikings, Atlanta Falcons and New Orleans Saints were added as expansion teams in 1960, 1961, 1966 and 1967, respectively. Joint Pretrial Order at 14, ¶ 28.

The American Football League ("AFL") was founded in late 1959 by Lamar Hunt, a scion of a Texas oil family, and began play in the fall of 1960. The demand for professional football was then sufficiently great to enable the AFL to obtain a contract with ABC for the years 1960-63. The new league was fueled in part by the NFL's cautious approach toward expansion; many of the AFL's original owners had unsuccessfully sought NFL franchises, and the majority of the AFL teams were located in cities without an NFL team. *See generally AFL v. NFL*, 205 F.Supp. at 66-75. The original eight teams were the Boston Patriots, Buffalo Bills, Dallas Texans, Denver Broncos, Houston Oilers, Los Angeles (San Diego after the 1960 season) Chargers, New York Titans, and Oakland Raiders. *Id.* at 62. The Miami Dolphins joined the AFL in 1960, the Cincinnati Bengals in 1968. Joint Pretrial Order at 14, ¶28. The AFL brought an unsuccessful antitrust suit against the NFL in 1962. *See AFL v. NFL*, 323 F.2d 124 (4th Cir.1963), *aff'g* 205 F.Supp. 60.

In 1966, the NFL and the AFL agreed to merge, largely because the competition for players had sharply increased salaries. Congress exempted this merger from the antitrust

laws by legislation discussed *infra*. The merger became fully effective when a twenty-six-team NFL began play in 1970 with two conferences, the National Football Conference and American Football Conference. The NFL reached its present size of twenty-eight teams when expansion teams began play in Seattle and Tampa in 1976.

In 1974, the World Football League ("WFL") was founded. The WFL lasted for one-and-one-half seasons before disbanding. Its teams were underfinanced and played in mostly smaller markets. The WFL never obtained a television contract with a major network, although its games were televised by a syndicated network. At least one of the league's teams tried unsuccessfully to enter the NFL through litigation. *See Mid-South Grizzlies v. National Football League,* 720 F.2d 772 (3d Cir.1983) (rejecting antitrust claim by WFL team denied admission to NFL).

The USFL was founded in May 1982 by David Dixon as a league that would play spring football. The league began play in March 1983 with teams in Birmingham, Boston, Chicago, Denver, Los Angeles, Michigan, New Jersey, Oakland, Philadelphia, Phoenix, Tampa and Washington. In part because of the location of its teams in major television markets, the USFL was able to obtain multimillion dollar network and cable television contracts with ABC and ESPN. Nevertheless, for reasons explored in detail *infra,* the USFL demonstrated little stability. Over its three seasons of spring football (one of which was a "lame-duck" season commenced after an announced decision to shift to fall play), the USFL clubs played in twenty-two cities,[5] and had thirty-nine

[5] The USFL teams played in the following cities/states:

1983	1984	1985	1986 (proposed)
Birmingham	Birmingham	Baltimore	Baltimore
Boston	Chicago	Birmingham	Birmingham
Chicago	Denver	Denver	Jacksonville
Denver	Houston	Houston	Memphis
Los Angeles	Jacksonville	Jacksonville	New Jersey
Michigan	Los Angeles	Los Angeles	Orlando
New Jersey	Memphis	Memphis	Phoenix

principal owners.[6] None of the majority owners of an original USFL team was a majority owner by 1986 when a planned fall schedule was aborted by the $1.00 verdict.

Oakland	Michigan	New Jersey	Tampa
Philadelphia	New Jersey	Oakland	
Phoenix	New Orleans	Orlando	
Tampa	Philadelphia	Phoenix	
Washington, D.C.	Phoenix	Portland	
	Pittsburgh	San Antonio	
	San Antonio	Tampa	
	Tampa		
	Tulsa		
	Washington, D.C.		

[6] The principal owners of USFL teams during 1983-85 were as follows:

Team	1983	1984	1985
Arizona	Jim Joseph	Edward Diethrich Bill Harris George Allen	William Tatham, Sr.
Baltimore	NA	NA	Myles Tanenbaum
Birmingham	Marvin Warner	Marvin Warner	Marvin Warner*
Boston	George Matthews Randy Vataha	NA	NA
Chicago	Edward Diethrich Bill Harris George Allen	James Hoffman**	Eddie Einhorn
Denver	Ron Blanding	Doug Spedding	Doug Spedding
Houston	NA	Jerry Argovitz Jay Lerner Alvin Lubetkin Jay Roulier***	Jerry Argovitz Alvin Lubetkin Jay Roulier
Jacksonville	NA	Fred Bullard	Fred Bullard
Los Angeles	Bill Daniels Alan Harmon	William Oldenburg****	
Memphis	NA	Logan Young William Dunavent	William Dunavent
Michigan	Alfred Taubman Max Fisher Peter Spivak	Alfred Taubman Max Fisher	NA
New Jersey	J. Walter Duncan	Donald Trump	Donald Trump
New Orleans	NA	Joseph Canizaro	NA
Oakland	Tad Taube	Tad Taube	Alfred Taubman Tad Taube
Oklahoma	NA	William Tatham, Sr.	NA
Orlando	NA	NA	Donald Dizney Jim English John Day
Phila.	Myles Tanenbaum	Myles Tanenbaum	NA
Pittsburgh	NA	Edward J. DeBartolo, Sr.	NA
Portland	NA	NA	Joseph Canizaro
San Antonio	NA	Clinton Manges	Clinton Manges
Tampa Bay	John Bassett Steve Arky	John Bassett Steve Arky	John Bassett Steve Arky
Washington	Berl Bernhard Bob Linowes	Berl Bernhard Bob Linowes	NA

3. *The NFL's Television Contracts*

The growth of the NFL was closely related to the growth of television. Beginning in 1951, the Dumont network televised five regular season games (twelve by 1954), as well as the championship game each year. In the mid-1950's, the Columbia Broadcasting System ("CBS") began broadcasting certain NFL regular season games for $1.8 million per year, and the National Broadcasting Company ("NBC") acquired the right to televise the NFL championship game. The broadcast rights to games were controlled by individual teams during the 1950's, however.

In 1961, the NFL teams agreed to sell their collective television rights as a single package and to share broadcast revenues equally among all franchises. This decision was in response to arguments by Commissioner Rozelle that the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually. In the long run, he believed, great differentials in television revenues among teams would lead to a competitive imbalance that would diminish the overall attractiveness of the NFL's product. *See* Transcript of Proceedings at 67-68, *United States v. National Football League,* No. 12808 (E.D.Pa. July 27, 1961) (testimony of Commissioner Rozelle); *see also United States Football League v. National Football League,* 634 F.Supp. 1155, 1161 & n. 2 (S.D.N.Y.1968) (*"Opinion No. 2"*). Rozelle's arguments were bolstered by the policy of the recently organized AFL to pool television rights and revenues in its first broadcast contract with ABC.

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* Mr. Warner surrendered his interest in the Birmingham franchise in April, 1985.
** Dr. Hoffman surrendered his interest in the Chicago franchise in January, 1984. Thereafter, it was operated by a corporation, CPHFC, Inc., until July 2, 1984, when a new franchise for Chicago was granted to Edjer Corp.
*** Mr. Roulier became a principal owner in June, 1984, replacing Mr. Lerner.
**** Mr. Oldenburg surrendered his interest in the Los Angeles franchise in June, 1984. The franchise was operated by a USFL corporation for the balance of the 1984 season. In November, 1984, a new franchise for the Los Angeles area was acquired by LAEFC, Ltd., a Colorado limited partnership. From November 1984 until January 30, 1985, Jay Roulier owned the stock of Express Football Club, Inc., the general partner of LAEFC, Ltd. As of January 30, 1985, the stock of Express Football Club, Inc. was acquired by USFL Holdings, Inc., the stock of which is wholly owned by the USFL.

Before the NFL could enter a pooled-rights television contract, however, it had to overcome several legal obstacles. An earlier attempt by the NFL to control the sale of television rights by its teams had been deemed a violation of Section 1 of the Sherman Act in *United States v. National Football League,* 116 F.Supp. 319 (E.D.Pa. 1953). In that case, the government sought to enjoin the enforcement of Article X of the NFL's by-laws, which regulated the broadcast of distant games into the home territories of other teams.[7] Applying Rule-of-Reason analysis, Judge Grim held that the restriction on the broadcast of outside games when home teams were playing away was an impermissible restraint of trade. *Id.* at 327. The Final Judgment provided that:

> The defendants are jointly and severally . . . enjoined . . . from directly or indirectly entering into . . . any contract, agreement or understanding with the league defendant or any member club of the league defendant, . . . having the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made.

United States v. National Football League, No. 12808, Final Judgment § V (E.D.Pa. Dec. 28, 1953), *quoted in Opinion No. 2,* 634 F.Supp. at 1159.

In 1961, the NFL brought a pooled-rights agreement with CBS before Judge Grim for a determination as to whether the agreement violated the 1953 Final Judgment. This contract provided that CBS would have the "right to determine, entirely within its own discretion . . . which games shall be televised and where such games be televised." *United States v. National Football League,* 196 F.Supp. 445, 447 (E.D.Pa.1961). Judge Grim held that CBS's authority to determine when and where games would be broadcast violated

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[7] Article X provided that "[n]o club shall cause or permit a game in which it is engaged, to be telecast or broadcast into any area included within the home territory of any other club, without the consent of such other club" on a day on which the other club was either playing or broadcasting one of its games at home. 116 F.Supp. at 329. The government contended that this provision restricted competition among clubs in the sale of broadcast rights.

Section V of the Final Judgment. *Id.* A subsequent motion by the NFL for a modification or suspension of the Final Judgment was denied. Judge Grim accordingly enjoined the execution and performance of the pooled-rights contract between the NFL and CBS, and further enjoined the NFL from entering into "any other contract and agreement having similar purpose or effect." *United States v. National Football League,* No. 12808 (E.D.Pa. July 28, 1961) (order construing 1953 Final Judgment).

Specifically intending to alter Judge Grim's order, *see* S.Rep. No. 1087, 87th Cong., 1st Sess. 1, *reprinted in* 1961 U.S. Code Cong. & Admin.News 3042, 3042, Congress enacted the Sports Broadcasting Act of 1961, which exempted from the antitrust laws pooled-rights agreements entered into by professional sports leagues. Pub.L. No. 87-331, § 1, 1961 U.S. Code Cong. & Admin.News 822, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291) (Supp. IV 1986). In order to protect college games from competition with pro football telecasts, the exemption did not apply to the broadcast of professional football games on Friday nights and Saturdays during the college football season. *Id.* § 2 (codified as amended at 15 U.S.C. § 1293 (1982)).

The first NFL pooled-rights contract was with CBS. For the 1962 and 1963 seasons, CBS was the only network permitted to bid for this contract because it had individual rights contracts running through 1963 with nine teams. The NFL received $4,650,000 per season from CBS during these two seasons. For the 1964-65 NFL contract, CBS outbid NBC and ABC with an offer of $14,100,000 per season. In 1964, the AFL, which had had a contract with ABC, entered into a five-year, $36 million contract with NBC.

In 1966, Congress amended the Sports Broadcasting Act specifically to confer antitrust immunity on the NFL-AFL merger. Pub.L. No. 89-800, § 6(b)(1), 80 Stat. 1515 (codified as amended at 15 U.S.C. § 1291). At the same time, the restriction on Friday night and Saturday telecasts was expanded to include protection for high school football. *Id.* § 6(b)(3). In

passing this legislation, Congress was plainly informed that, upon consolidation of the two leagues, the NFL would have broadcast contracts with at least two networks. *Professional Football League Merger: Hearings on S. 3817 Before Antitrus. Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary,* 89th Cong., 2d Sess. 64, 66, 119 (1966).

In 1970, the NFL entered into a contract with ABC to televise a game nationally on Monday nights. Since then, all three major television networks have broadcast NFL games,[8] and the NFL's annual revenues from television have increased by more than 800 percent. The NFL teams received approximately $186 million for the 1970-73 seasons; $268 million for the 1974-77 seasons; $646 million for the 1978-81 seasons; and $2.1 billion over the five-year period 1982-86.

The ABC, CBS and NBC contracts from 1970 onward have given each network rights of first negotiation and first refusal to decide whether to continue its NFL contract for subsequent years. The NFL's 1982-86 contracts were nonexclusive and did not forbid a network from televising another football league's games at any time when it was not broadcasting NFL games. NBC was thus legally free to televise to a particular city another league's games on Sunday afternoons directly opposite NFL games on CBS when there was no NFL game scheduled for NBC to be televised to that city. CBS had a similar option. ABC was legally free to televise another league's games all afternoon each Sunday. All three networks

[8] ABC now televises Monday night games and certain prime-time games. CBS televises National Football Conference ("NFC") games throughout the season, on Thanksgiving Day, and on Saturdays in December. NBC televises American Football Conference ("AFC") games throughout the season, Thanksgiving Day, and on Saturdays in December. Interconference games are televised by the network with the rights to the conference of the visiting team. CBS televises NFC playoff games, and NBC televises AFC playoff games. The first Super Bowl, held in 1967, was broadcast by both CBS and NBC. Since 1967, CBS and NBC have alternated telecasts of the Super Bowl, except that pursuant to its 1982-86 contract with the NFL, ABC televised the Super Bowl played in January 1985. Broadcasting rights to Super Bowl games are not bid for separately but are rotated among the networks.

were legally free to telecast another league's games in prime time. Because the NFL was forbidden by its network contracts to televise games on cable, cable television contracts were open to a competing league, although such contracts are less lucrative than network contracts. When the NFL's network contracts expired in 1981 and 1986, the networks were free to contract with a competing league's games for all time slots.

The NFL's three-network "tie-up" was a central issue at trial. The USFL claimed that the NFL intentionally set out to tie up the three networks as a means of excluding competitors. In support of its theory, the USFL introduced a memorandum from NFL general counsel Jay Moyer written during the NFL's 1973 network contract negotiations stating that "an open network may well be an open invitation to formation of a new league." Commissioner Rozelle testified, however, that in 1970, before contacting ABC and signing the Monday night football contract with it, he unsuccessfully approached CBS and NBC, both of which already televised NFL games, about their interest in prime-time football. The USFL also emphasized at trial a June 1984 CBS business study suggesting that the fall broadcast of USFL games on Sundays would reduce the network's advertising revenues from NFL games by $49 million to $53 million over three years. This "dilution effect," the USFL argued, created a $50 million barrier to entry by a new league.

The USFL also sought to show that the NFL had placed unlawful pressure on the networks to prevent the broadcast of USFL games. Much of this evidence consisted of statements by USFL representatives and hearsay and speculation by third parties.[9] Officials from the three networks and one

[9] USFL Commissioner Harry Usher testified that he was told by Roone Arledge, the president of ABC Sports, that Arledge "had had negative reaction from the NFL for putting the USFL on initially." ABC sportscaster Howard Cosell testified that he was told by Arledge that Commissioner Rozelle was "all over" Arledge because ABC was televising the USFL in the spring. (Arledge testified unequivocally that he had never

cable network testified that the NFL had not exerted any pressure on them regarding the broadcast of USFL games.[10] Several network officials did testify, however, that they feared that televising the USFL in the fall might jeopardize their NFL relationships[11]—a fear somewhat at odds with the USFL claim that the NFL needed three network contracts to produce the "dilution effect." Executives from all three major networks also testified that by 1986, after the USFL had left several large television markets and was encountering financial and other difficulties, the USFL was not an attractive entertainment product.[12]

4. *"Conquering the USFL": Predatory Tactics*

The USFL also sought to prove monopolization by the NFL through predatory tactics unrelated to television. It thus introduced a memorandum prepared by NFL labor negotiator Jack Donlan entitled "Spending the USFL dollar," which urged NFL owners to bid for USFL players to drive up USFL costs. The USFL's proof of predatory behavior, however, consisted primarily of allegations concerning the recommen-

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made such a statement to Cosell.) Jim Spence, a senior vice-president at ABC, testified that he believed that the NFL was "less than enamoured" of the network's dealings with the USFL, although he did not recall that any NFL official had directly expressed any displeasure to him.

[10] For example, Jim Spence, former senior vice-president of ABC Sports; Frederick Pierce, former president of ABC; Roone Arledge, group president of ABC News and Sports, former president of ABC Sports; Neil Pilson, president CBS Sports, executive vice-president of CBS, former president of CBS Sports; Arthur Watson, president of NBC Sports; William Grimes, president of ESPN.

[11] For example, CBS Sports President Neil Pilson testified that he would consider televising the USFL in the fall only if another network was involved. This double exposure would increase the USFL's value and also not leave CBS in a position that would induce the NFL to give the other networks better treatment, including a better schedule of games.

[12] NBC Sports President Watson testified that his network did not conduct a business study concerning the feasibility of broadcasting USFL games on Saturday in the fall because of the network's commitments to other sporting events, including baseball, college basketball, golf, and thoroughbred racing.

dations of the so-called "Porter Presentation," and of the so-called Oakland and New York "conspiracies."

The Porter Presentation was a two-and-one-half hour presentation, entitled *USFL v. NFL*, by Harvard Business School Professor Michael Porter to sixty-five NFL executives attending a multiday seminar on labor negotiations. Porter's presentation, which was not previewed by anyone in the NFL, set out a strategy for the NFL to "conquer the USFL."

The USFL claimed that the NFL implemented a recommendation of the Porter Presentation by attempting to "co-opt" USFL owners with promises of an NFL franchise. Donald Trump, owner of the USFL's New Jersey Generals, testified that he was offered an NFL franchise by Comissioner Rozelle in exchange for his blocking the USFL's proposed move to the fall and his preventing the league from filing the instant action. Rozelle denied that he made such an offer to Trump. In addition, heresay testimony by Al Davis, owner of the NFL's Los Angeles Raiders, a team not sued by the USFL, indicated an attempt to co-opt Alfred Taubman of the Michigan Panthers. Taubman, however, denied that he was offered an NFL team.

The USFL also claimed that the NFL followed Professor Porter's recommendation to "dissuade" ABC from continuing its USFL contract. Supporting evidence consisted largely of hearsay introduced to show the state of mind of the networks. The declarants denied making any such statements. Jim Spence of ABC did testify, however, that the NFL informed him that the NFL owners were "not enamored" with the network's USFL contract. Nevertheless, ABC subsequently offered the USFL a four-year, $175 million contract for spring football beginning in 1986. The USFL also claimed that the NFL used a method recommended by Porter to pressure ABC by offering it unattractive Monday night games that would and did earn low ratings in 1984. In response, NFL officials testified that the 1984 *Monday Night Football* schedule was settled before the Porter Presentation, that "weak" teams such as Buffalo and Cincinnati appeared on that sched-

ule fewer times than in prior years, and that any change in ABC's ratings was due to economic conditions that affected the entire sports television marketplace.

Finally, the USFL claimed that the NFL followed Porter's recommendations for competing for players. This evidence consisted of the NFL's decision to conduct a supplemental draft of players still under USFL contract in March 1984, an increase in NFL roster size from forty-five to forty-nine, conversations between the Dallas Cowboys and USFL star Herschel Walker, and NFL salary offers to relatively unknown USFL players such as Todd Fowler.

The USFL also contended that the NFL and the City of Oakland conspired to destroy the USFL's Oakland Invaders in return for an NFL promise that Oakland would receive an NFL team. This so-called "Oakland conspiracy" was based on the testimony of Al Davis that he "sensed" that the NFL wanted to "destroy" the Invaders and on Commissioner Rozelle's public statement that Oakland, having lost the Raiders, would be considered for an NFL expansion franchise.

The "New York conspiracy" involved a claim that the NFL and the NFL's New York Jets conspired to mislead New York City and State officials into believing that the Jets were willing to return from New Jersey to New York. The purpose of this conspiracy was to block the USFL's New Jersey team from moving to a new domed stadium in New York. Proof of this conspiracy consisted of testimony by Senator Alphonse D'Amato and Vincent Tese, Chairman and Chief Executive Officer of the New York State Urban Development Corporation, that Leon Hess, owner of the Jets, had promised to return his team to New York. In addition, Al Davis testified that there was an "understanding" reached at a 1983 NFL owners' meeting to keep a USFL team out of New York. Other participants in this meeting denied any such understanding or agreement.

5. *Damages*

The USFL's evidence of damages consisted of the testimony of economist Nina Cornell, who sought to estimate the league's losses by two methods. Method A was based on the assumption that the gate and television revenues of an unhindered USFL could be estimated by using the gate receipts and television revenues of the old AFL. Dr. Cornell estimated the USFL's damages under this method at $565 million. Method B was based on the June 1984 CBS business study examining the fall broadcast of USFL games. She estimated the USFL's damages under this method at $301 million.

Dr. Cornell's damage calculations rested on several other assumptions. First, of course, she assumed that illegal NFL conduct was the cause of the USFL's failure to obtain a network contract. Second, Dr. Cornell assumed that the NFL could lawfully contract with only one network. Third, her calculations attributed the USFL's damages entirely to illegal NFL conduct and not at all to the USFL's own mismanagement.

Finally, she assumed that there would be no increased player costs to the USFL resulting from the shift to fall play and that salaries would remain stable from 1986 to 1992. Tension existed between her assumption of stable salaries and her projections of large increases in USFL revenues as a result of playing in the fall during the 1986 to 1992 seasons. Player salaries had already increased dramatically because of the two leagues' competition for players, even when they were playing in different seasons. No reason was given to expect a stabilization of wages when the leagues would play in the same season and the USFL would have substantially greater revenues to compete for players. Moreover, a cornerstone of the USFL's television claim was that a network contract was essential so that it could compete for quality players, a position that is hardly consistent with stability in player salaries.

6. *Management of the USFL*

The USFL was conceived and organized in 1981 to play in the spring rather than the fall. Its founders believed that public demand for football was not satisfied by the NFL's and the colleges' fall seasons; that cable television, which could not televise NFL games under the existing NFL-network contracts, would offer unique opportunities for television revenues and exposure; that a spring football league would face limited competition; that there was a sufficient supply of football players for two leagues; and that a spring league could draft college players and put them on the field even before the NFL draft.

The USFL's founders placed a high priority on the fans' perception of the quality of play. They intended to use major stadiums[13] and to hire well-known coaches.[14] At the same time, they wanted the league to control costs. For its first season, therefore, the USFL established budget guidelines for player salaries of between $1.3 and $1.5 million per team.

The USFL's founders did not seek to obtain a television contract for fall play. Before fielding a team, however, the USFL received bids for a spring television contract from ABC and NBC and from two cable networks, ESPN and the Turner Broadcasting System. The league entered a four-year contract with ABC, and a two-year contract with ESPN. The ABC agreement provided for ABC to pay the USFL $18 mil-

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[13] Included were such prominent NFL stadiums as Soldier Field in Chicago (capacity 65,793); the New Orleans Superdome (72,675); Giants Stadium in New Jersey (76,891); the Houston Astrodome (47,965); the Silverdome in metropolitan Detroit (72,675); and RFK Stadium in Washington, D.C. (54,794). Before trial, Judge Leisure granted summary judgment in favor of the NFL on the USFL's stadium-related claims *Football League v. National Football League,* 634 F.Supp. 1155, 1179-80 (S.D.N.Y.1986) *("Opinion No. 4").* This ruling has not been appealed.

[14] A number of the USFL's coaches had coached in the NFL: George Allen (Redskins and Rams); Chuck Fairbanks (Patriots); Frank Kush (Colts); Walt Michaels (Jets); Red Miller (Broncos); and John Ralston (Bills). Several had been successful NFL players: John Hadl, Craig Morton, Jack Pardee and Steve Spurrier.

lion for the 1983 and 1984 seasons, with options exercisable by ABC at $14 million for 1985 and at $18 million for 1986.[15] ESPN contracted to televise USFL games for two years at rights fees of $4 million for 1983 and $7 million for 1984. The USFL began with eight of its twelve teams in the nation's top ten television markets. The ABC contract required the USFL to field teams in the three largest television markets (New York, Los Angeles and Chicago) and in at least four of the five other top-ten television markets in which teams were originally located (Philadelphia, Boston, Detroit, San Francisco/Oakland and Washington).

The USFL's first year of play, 1983, was a mixed success. The league received extensive media exposure when it signed Heisman Trophy winner Herschel Walker to a three-year, $3,250,000 contract. The Nielsen television rating for the first week of games was 14.2, a figure comparable to NFL ratings. As the season went on, however, the USFL's television ratings declined; average television ratings for the year were 6.23 on ABC and 3.28 on ESPN. Average attendance for the year was approximately 25,000. Nevertheless, these figures were consistent with the league's and networks' preseason projections.

On the financial side, the picture was not as bright. The USFL lost a total of almost $40 million, or an average of $3.3 million per team. The league had projected losses of only about $2 million per year for each team over the first three years. The unanticipated financial losses were chiefly the result of the failure to stay within the original salary guidelines. Indeed, in a November 1983 letter to other owners, Tad Taube of the Oakland team warned that: "If we are not successful in establishing player [salary] caps I can guarantee you that there will not be a USFL within three years, irrespective of improved revenue [from] television. . . . We have sighted the enemy and they are us!"

[15] The ABC agreement provided for additional payments for the telecast of more than twenty USFL games per season as well as for the shifting of daytime telecasts into prime time.

The USFL's second year was marked by change. Four teams shifted locations. For example, the owner of the Chicago franchise exchanged that franchise for the Phoenix franchise, taking his winning Chicago coach and players while the original Phoenix team moved to Chicago under a new owner. The league, over the objection of some owners, expanded from twelve teams to eighteen. Five of the original owners left the league. Some of the new owners, notably Donald Trump of the New Jersey Generals, believed that the USFL ought to play in the fall. Thereafter, the issue of when to play became divisive, and several owners came to believe that Trump was trying to bring about a merger with the NFL that would include only some USFL teams.[16]

The NFL introduced extensive evidence designed to prove that the USFL followed Trump's merger strategy, and that this strategy ultimately caused the USFL's downfall. The merger strategy, the NFL argued, involved escalating financial competition for players as a means of putting pressure on NFL expenses, playing in the fall to impair NFL television revenues, shifting USFL franchises out of cities where NFL teams played into cities thought to be logical expansion (through merger) cities for the NFL, and, finally, bringing the antitrust litigation now before us.

Throughout the second half of 1983 and early 1984, several USFL owners escalated spending on player salaries. USFL teams, for example, signed established NFL players such as running back Joe Cribbs and defensive back Gary Barbaro. Trump, in particular, signed a number of players who were still under contract with the NFL to future contracts, including superstar Lawrence Taylor of the New York Giants. USFL owners also signed many top players coming out of college, for example, wide receiver Anthony Carter and

[16] After a January 1984 USFL owners' meeting, Myles Tanenbaum of the Philadelphia franchise complained that the " 'Original' franchise owners" had become outnumbered, and expressed his outrage that "one of the group believes it would be fair or appropriate to simply 'pay off' others in the event there is a potential big hit by way of merger or whatever."

quarterback Jim Kelly. The USFL's spending on players greatly outpaced its revenues. The owner of the Los Angeles team, for example, committed the team to $13.1 million in salaries and bonuses for just one season. He even entered into a multiyear, $40 million contract with just one player, Steve Young of Brigham Young University.

By the end of the 1984 season, USFL franchises in two of the top three television markets, Chicago and Los Angeles, had failed, and only four of the original owners remained in the league. The league was not a failure as entertainment, however. Despite a decline in the USFL's television ratings to 5.7 on ABC and 2.8 on ESPN, ABC exercised its option to carry the USFL in the spring of 1985 at $14 million and offered a new contract worth $175 million for four years in the spring beginning in 1986. ESPN offered a contract worth $70 million over three years.

Nevertheless, during an August 1984 owners' meeting, the USFL decided to move to the fall in 1986. This decision was made despite: (i) ABC's warning that such a move would breach its contract for the spring of 1985 and 1986; (ii) the contrary recommendations of a management consulting firm, McKinsey & Company, which the USFL had retained for $600,000 to consider the advisability of a fall season; and (iii) the contrary recommendations of the USFL's directors of operations and marketing.

Moreover, Eddie Einhorn, a USFL owner who was to represent the USFL in negotiations to secure a network contract for the fall, warned that moving from large television markets to "merger" cities too quickly might preclude the securing of a network contract. Nevertheless, in the ensuing months, the USFL withdrew from Chicago, Detroit, Philadelphia, Pittsburgh and Washington, D.C.—each a large television market with an NFL team—and moved into Baltimore (which had lost its NFL team in 1984) and Orlando (which had no NFL team). Through mergers, the USFL bolstered franchises in Oakland (which had lost the NFL Raiders to Los Angeles) and Phoenix (which had been discussed as a possible NFL

expansion city). The decision to move to the fall damaged the USFL's relations with ABC and ESPN. The former withheld a significant portion of the USFL's rights fees for the 1985 season, while the latter demanded a renegotiation of its proposed 1985-87 USFL contract. The following table reflects the USFL's movement from the top television markets:

1983	1984	1985	1986 (Proposed)
New York	New York	New York	New York
Los Angeles	Los Angeles	Los Angeles	
Chicago	Chicago	San Francisco/ Oakland	
Philadelphia	Philadelphia		
San Francisco/ Oakland	San Francisco/ Oakland		
Boston	Detroit		
Detroit	Washington		
Washington			

In October 1984, the instant litigation was begun. The USFL's 1985 "lame-duck" spring season appears to have been affected adversely by the now publicly announced move to the fall. The league's television ratings declined to 4.1 on ABC and 2.0 on ESPN. By the end of the season, several owners had withdrawn financial support for their teams, and a number of clubs were no longer meeting their payrolls and other bills. The USFL scheduled eight teams for its fall 1986 season, which was ultimately cancelled after the verdict in this case. Only one team (New Jersey), was in a top-ten television market. One other team (Tampa Bay), was in a top-twenty market. Three teams were located in Florida (Jacksonville, Orlando and Tampa Bay) but only one was west of the Mississippi River (Phoenix). In three years, USFL teams had left fourteen of the twenty-two cities in which they had played.

7. *The Verdict*

The jury found the NFL liable on the USFL's claim of actual monopolization, concluding that the older league had willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United

States (Question No. 4). The jury also found that the NFL's unlawful monopolization had caused injury to the USFL (Question No. 5). In ruling on the NFL's motion for judgment notwithstanding the verdict with respect to these findings, the district court held that sufficient evidence existed that the NFL had engaged in predatory conduct. This evidence related to: (1) NFL efforts to co-opt USFL owners and potential owners; (2) the NFL Supplemental Draft of USFL players; (3) the NFL's move to a forty-nine-man roster; and (4) the NFL's activity directed at specific USFL franchises such as the Oakland Invaders. *Opinion No. 16,* 644 F.Supp. at 1058.

The USFL was unsuccessful on its remaining claims. The jury found that none of the defendants had violated Section 2 by attempting to monopolize a relevant market (Question No. 7), or by conspiring to monopolize (Question Nos. 12-14). In addition, the jury found that even though "one or more defendants [had] participate[d] in a contract, combination or conspiracy to exclude competition within major league professional football" (Question No. 20), that combination was not an unreasonable restraint of trade in violation of Section 1 (Question No. 21). The fatal blow, however, was the complete rejection of the USFL's television claims. The jury found that the NFL had not willfully acquired or maintained a monopoly in a relevant television submarket (Question No. 4). It further found that the NFL's contracts with all three television networks for the right to broadcast the league's regular season and championship games through the 1986-87 season were not an unreasonable restraint of trade violative of Section 1 (Question No. 24). Finally, the jury rejected the USFL's "essential facilities" claim, specifically finding that "defendants [did not] have the ability to deny actual or potential competitors access to a national broadcast television contract" (Question No. 33), although it also found that such a contract was "essential to the ability of a major league professional football league to compete successfully in the United States" (Question No. 31) and "that potential competitors of

the NFL, cannot as a practical matter, duplicate the benefits of a network contract" (Question No. 32).[17]

DISCUSSION

On appeal, the USFL raises a host of claims with respect to the NFL's liability, the district court's evidentiary rulings, damages charge, and denial of injunctive relief.

1. *Liability*

a. The Sports Broadcasting Act

The USFL contends that the Sports Broadcasting Act of 1961 limits the anti-trust exemption for pooled-rights contracts to a single contract with one network. Therefore, it argues, the NFL's multiple contractual arrangements with three networks violates the injunction in *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa.1953), a decision claimed by the USFL collaterally to estop the NFL from denying that its arrangements with the networks violate Section 1 of the Sherman Act.

> The Sports Broadcasting Act states that: The antitrust laws . . . shall *not* apply to all joint agreement by or among persons engaging in or conducting the organized professional team sport[ ] of football, . . . by which any league of clubs participating in professional football . . . contests sells or otherwise transfers *all or any* part of the rights of such league's member clubs in the sponsored telecasting of the game[ ] of football. . . .

15 U.S.C. § 1291 (emphasis added). This statutory language thus neither states nor implies that the exemption limits the NFL to a contract with only one network. *See, e.g., United States v. James*, 478 U.S. 597, 106 S.Ct. 3116, 3121, 92

[17] In ruling that any inconsistency in these verdicts did not require a new trial, a ruling not challenged on appeal, the district court first recognized that inconsistent verdicts in a civil case are fully permissible in this circuit. *Opinion No. 16*, 644 F.Supp. at 1045 (citing *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1290 n. 17 (2d Cir. 1969), *cert. denied*, 397 U.S. 913, 90 S.Ct. 913, 25 L.Ed.2d 93 (1970)). The court also plausibly reconciled the actual verdicts in the instant case. *Id.* at 1046-48.

L.Ed.2d 483 (1986) (statute foreclosing government "liability of *any* kind . . . for *any* damage from or by floods" "outlines immunity in sweeping terms . . . It is difficult to imagine broader language"); *United States v. Holroyd,* 732 F.2d 1122, 1124, 1128 (2d Cir.1984) (statute proscribing willful filing with IRS of "any" statement not believed to be accurate "means what it says on its face" and covers *all* statements to IRS). Moreover, the legislation does contain express limitations on the exemption designed to protect college football from televised competition with the NFL, which suggests by implication that no other limitations exist.

Faced with statutory language unambiguously hostile to its claims, the USFL resorts to alleged ambiguities in the legislative history. Upon examination, however, the legislative history offers no reason to depart from the statutory language. For example, NFL Commissioner Rozelle stated during the congressional hearings on the Act that if all the networks were tied up by the NFL, a competing league "would . . . possibly be at a major disadvantage" and that the bill was designed to allow the NFL to televise on one network. *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Sub-comm. (Subcomm. No. 5) of the House Comm. on the Judiciary,* 87th Cong., 1st Sess.35(1961). These remarks were made, however, during a colloquy in which Rozelle twice stated explicitly that the proposed legislation would allow the NFL to utilize all three networks. Moreover, he predicted that, although the NFL had a present intention to use only one network, in twenty years a "single network may no longer be desirable, and it may become much better for the public and the league to use more than one network." *Id.* Rozelle's testimony thus provides little comfort to the USFL.

More tellingly, the USFL also relies upon the following passage in the House Report accompanying the 1961 legislation:

> Some concern has been expressed that the language of this section might be considered to give an absolute exemption from the antitrust laws for any kind of television arrangements entered into by a league, and particularly an arrangement which might involve several networks and might thus exclude a competing league from all television coverage. This is not the intent of H.R. 9096 which is designed to permit the sale of television rights by a league and its member clubs to a single network. The committee does not intend that an exemption from the antitrust laws should be made available to a league or its members where the intent or effect of a joint agreement is to exclude a competing league or its members from the sale of any of their television rights.

H.R.Rep. No. 1178, 87th Cong., 1st Sess. 4 (1961). This language was apparently included at the suggestion of AFL Commissioner Joe Foss, who testified that the proposed legislation should guard against agreements with networks that unreasonably excluded competing leagues. *See Opinion No. 2,* 634 F.Supp. at 1162.

We believe the USFL exaggerates the import of that statement in the House Report. The report says no more than that multiple pooled-rights agreements may be the subject of a monopolization or unreasonable restraint of trade claim by a competing league. Precisely such claims were submitted to the jury in this case and rejected by it.

The Senate Report does not expressly address the issue of multiple network contracts, other than to conclude ambiguously that the public interest would be served "with minimal sacrifice of antitrust principles by exempting *joint agreements* under which a league sells or transfers pooled television rights of its members to *a purchaser.*" S.Rep. No. 1087, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin.News 3042, 3044 (emphasis added).

In any event, the passage of the 1966 NFL-AFL merger statute provides conclusive evidence that Congress did not intend the 1961 Act to prohibit NFL contracts with more than

one network. When considering this legislation, Congress was explicitly informed that the merged league would continue to broadcast its games on "at least 2 networks,"[18] and no concern whatsoever was expressed in Congress that such conduct was either undesirable or would go beyond the scope of the 1961 Act's exemption. Moreover, while permitting the merger, Congress added a further limitation to the exemption to protect high school games from televised competition with the NFL. The lack of a "one network" limitation in the 1966 merger bill thus dooms the USFL's claims. Accordingly, we hold that the mere existence of the NFL contracts with the three networks does not violate the antitrust laws. Having made this determination, we need not consider whether the decree in *United States v. National Football League* has any collateral-estoppel effect.

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[18] During the hearings on the merger bill, Commissioner Rozelle testified "that because of the logistics of handling perhaps 13 or 14 games on a Sunday afternoon, [the NFL] would require at least 2 networks." *Professional Football League Merger: Hearings on S. 3817 Before the Antitrust Subcomm. (Subcomm. 5) of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 64 (1966). In response to the question of whether New York City residents would be able to see professional football on television when the other New York club was playing a home game, Rozelle said that the league would try to do so, "which is why I feel we will probably have to go to two networks, to assure that each of the 26 or 28 teams has all of its road games brought back to its home city." *Id.* at 66. Moreover, the NFL and AFL submitted a memorandum to the subcommittee concerning whether the merger would result in reduced broadcasts of football games:

> Because a single network cannot practicably establish as many as twenty-eight regional networks and because the expanded league desires to maintain its present level of club television income, the plan contemplates the continued *use of two networks* by the expanded league, *e.g.*, on a conference or other divisional basis. Thus, both during the period prior to the expiration of the existing television contracts and afterwards, it is contemplated that there will be continued home viewer access to duplicate broadcasts, including telecasts of other league games into home cities on days when the home team is playing at home.

Id. at 119 (emphasis added).

b. The "Dilution Effect"

The USFL does not argue that there was insufficient evidence to support the jury's rejection of its claim that the NFL prevented it from obtaining a network contract. The failure to make this argument is understandable in light of the swift dismissal such a claim would encounter. However, the USFL does the next-best thing by attacking the district court's instructions regarding "intent *and* effect" and "legitimate business purpose," both discussed immediately *infra,* on grounds that these instructions led the jury to ignore an "unchallenged showing of anticompetitive effect" and "textbook example of an anticompetitive practice." Moreover, the USFL continues to seek broad injunctive relief concerning the NFL's television contracts on the ground that such relief is necessary to bring competition to the industry. Because these claims are based on the so-called "dilution effect" of the NFL's contracts with the three networks, a separate discussion of the concept of a "dilution effect" and its role in the professional football industry is necessary.

The term "dilution effect" comes from a CBS business study ordered by Neil Pilson, CBS Sports' President, and completed in June 1984. CBS conducted the study because it was apprehensive over ABC's signing a USFL fall contract and desired the leverage a second league would afford it in its negotiations with the NFL. The study estimated the economic impact on CBS of the televising of USFL games in the fall under various scenarios. One scenario posited only ABC televising USFL games on Sundays. The scenarios most pertinent to the present discussion posited CBS and either NBC or ABC televising USFL games. Under these scenarios, CBS would televise both USFL and NFL games on Sundays. The final scenario posited USFL games being televised by NBC and ABC on fall Sundays. No study was made of CBS being the only network with a USFL contract because CBS was not interested in such an arrangement. *See supra* note 11.

As explained by Pilson, the value of a USFL fall contract to CBS was determined (in simplified fashion) as follows. From the estimated gross advertising revenues would be subtracted estimates of: (i) expenses related to production; (ii) losses in revenues that would otherwise have been earned by programs preempted by USFL games, or "preemptive impact"; (iii) decreases in advertising revenues from NFL games resulting from the addition of USFL games, or "dilution effect"; and (iv) rights fees to the USFL. Pilson testified that when these estimates were made in June 1984, the resultant calculation, CBS's profit, was negative. The USFL argues that, but for the "dilution effect" of $50 million, the sum would have been sufficiently positive to make a USFL contract attractive. The USFL assumes that the "dilution effect" was experienced equally by all three networks and thus concludes that the effect of NFL's network contracts was to exclude all competition.

The district court instructed the jury to analyze the NFL's television contracts in light of the CBS study. Specifically, the jury was told to consider "[t]he high NFL rights fees charged to the networks, which plaintiffs allege triggered a dilution effect that makes it economically infeasible for any network to offer a satisfactory television contract to any professional football league other than the NFL." The jury rejected the USFL's claims as to the "dilution effect" in finding that the NFL had not monopolized a television submarket, that the NFL television contracts were not an unreasonable restraint, and that the NFL did not have the power to exclude a competing league from obtaining a network contract. There was ample evidence to support these conclusions.

First, the USFL concedes, as it must, that the "dilution effect" is nonexistent when the NFL network contracts expire and negotiations over new contracts are under way. Whatever exclusionary effect exists is only for the term of the three NFL network contracts, and all leagues are free to compete on the basis of the quality of their product upon the expiration of these contracts. The district court's instructions

directed the jury to consider the length of these contracts, then five years, in determining whether they were reasonable. Its verdict, therefore, is dispositive because the duration of the contracts was hardly unreasonable as a matter of law.

Second, there was no evidence that the result of the calculations described above would be the same for ABC as for CBS. ABC's contract was largely confined to televising a single NFL game in prime time on a weekday night. Its Sundays were free of football, and it would not encounter the scheduling problems faced by CBS in televising both NFL and USFL games on Sunday afternoons. ABC was thus free to schedule games so as to maximize revenue. Moreover, whatever "dilution effect" ABC's prime-time games might suffer was not necessarily identical to that faced by CBS. The jury might easily conclude, absent evidence to the contrary, that the "dilution effect" on CBS from back-to-back NFL-USFL telecasts on Sunday afternoons would be greater than on ABC, which would not broadcast NFL games on Sunday. And there was no evidence to the contrary. The USFL, which bore the burden of proof on this issue, called two witnesses from ABC in a position to testify about the "dilution effect" on ABC. Neither witness was questioned about the "dilution effect." Both did testify, however, that the USFL's exodus from major television markets and its other difficulties greatly diminished the value of USFL telecasts by 1985 and 1986.

Third, the conduct of the NFL and the networks indicates that neither believed their contracts to be exclusionary. Notwithstanding the early opinion of the NFL's Moyer about a network without a contract being an "open invitation to a new league," the NFL's actual conduct displayed no marked desire to lock up all three networks. Prime-time weekday telecasts were offered to NBC and CBS, both of whom already had NFL contracts, before ABC was approached. It was the testimony of both the ABC executives and CBS's Pilson, elicited by counsel for the USFL, that Rozelle routinely used the threat of leaving them without an NFL con-

tract in order to extract from them the largest possible rights fees. If the "dilution effect" theory of exclusion were correct, the NFL could not credibly threaten to leave one network without a contract. If the theory were correct, moreover, the last network to sign with the NFL would have a bargaining advantage because its agreement would be essential to the NFL's monopoly, much as the owner of the last lot in a tract of land needed for a construction project can demand the highest price. In the NFL-network negotiations, the opposite was the case, and the last network to sign was at a bargaining disadvantage. Thus, in 1982, the NFL first signed agreements with ABC and NBC and then approached CBS. According to Pilson, CBS regarded itself as being in a very disadvantageous bargaining position. As a result, CBS paid $736 million for the new contract, an increase of more than 100% over its previous contract. On the basis of this evidence, therefore, the jury would have been hard-pressed to conclude that the NFL needed a contract with CBS to freeze out a competing league, a circumstance that would have precluded a credible threat to leave CBS without a contract and the resultant hefty increase in rights fees.

Fourth, even if the "dilution effect" theory were alive and well in 1986, the jury could have found that that "effect" was not a cause of the USFL's failure to get a network contract in that year. The CBS study was made in 1984 and was based on estimates of revenues that were plainly excessive given the circumstances of 1986. Immediately after the study was completed, the Supreme Court decided *National Collegiate Athletic Association v. Board of Regents,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), invalidating the NCAA's exclusive control over the televising of college football games. This decision had the effect of multiplying greatly the number of college games telecast and of reducing advertising revenue generally for football games. An ABC witness also testified there was a proliferation of sporting events on network and cable television after the fall of 1984 that also reduced the advertising fees that could be charged for professional football. In addition, there were the problems of the USFL itself.

The league had failed to establish fan loyalty in most places because of repeated franchise moves. Most importantly, the USFL had abandoned most major television markets, thereby rendering telecasts of its games much less valuable than had been estimated by the earlier CBS study. Finally, the disagreements among the USFL owners, the financial condition of some of the franchises, and the "lame-duck" spring season of 1985 further lessened the value of USFL telecasts in 1986. In fact, Pilson himself testified that by 1986 the events described above had rendered the "dilution effect" irrelevant to CBS's decision not to televise the USFL. In light of this evidence, the jury was free to conclude that the revenues to be expected from USFL telecasts were so low that no network would purchase them even if there were no "dilution effect."[19]

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[19] The USFL's brief offers an extreme version of the "dilution effect," which we quote:

> The NFL's television-related conduct constitutes a textbook example of an anticompetitive practice available only to one who dominates the market. In a normal, competitive market, the NFL's extraction of monopoly rents by fixing its rights fees at an artificially high level would prove pro-competitive by attracting new businesses into the market. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 [106 S.Ct. 1348, 1354, 89 L.Ed.2d 538] (1986). But by tying up the only three television networks capable of providing the revenue to support a competing league, and increasing the actual rights fees charged each of them by 625% in less than ten years (a feat only attainable through the exercise of market power), the NFL forces the networks in turn to raise NFL advertising prices above competitive levels. This in turn creates a disincentive to televise a rival, competitively-priced football league in the fall because such a lower-priced league would drive down advertising rates and reduce the NFL viewing audience. This disincentive, termed the "dilution effect" and quantified by CBS at $50 million, applies equally to all the networks and prevents them from considering fairly the merits of a new league.

USFL Br. at 39 (footnote and citation to record omitted).

Even putting aside the unproven factual premises—the existence of monopoly rents, the identical impact of the "dilution effect" upon all networks, the quantification of $50 million as realistic for 1986—this theory appears to posit a uniquely sadomasochistic economic relationship in which the more the seller charges, the happier the buyer is. Needless to say, the

c. "Intent *and* Effect" Charge

We now consider the district court's instruction regarding liability on the USFL's television-related claims. The USFL contends that it should not have been required to show that the intent *and* effect of the NFL's television contracts with the major networks were exclusionary (rather than simply intent *or* effect) in order to prove a Section 2 claim. In addition, the USFL contends that the district court erred with respect to the Section 1 television instruction because it applied the intent-*and*-effect standard to the Rule-of-Reason claims. We reject both contentions.

The district court gave the following charge with respect to the USFL's Section 2 televison-related claims:[20]

> A company may not be found to have wilfully acquired or maintained monopoly power if it has acquired that power solely through the exercise of superior foresight and skill or because of natural advantages . . ., or because of economic or technological efficiency; . . . or by laws passed by Congress
>
> . . . .
>
> In this regard, you should be aware that in 1966 Congress passed a law permitting the merger of the two major football leagues then existing. . . .
>
> Accordingly, I instruct you that the 1966 merger of the AFL and NFL cannot be the basis for inferring that the NFL acquired monopoly power unlawfully.

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network executives who testified did not describe their negotiations with Rozelle as fitting that model. Nor was there evidence indicating why the networks had to be "forced" by high NFL rights fees to charge advertising prices the market would bear anyway.

[20] The USFL incorrectly claims that the district court's instructions applied a more stringent standard of proof to its television claims than to other claims. In fact, the intent-*and*-effect charge was given on all the monopolization issues. The USFL also claims it was surprised by the intent-*and*-effect charge. It was aware before trial, however, that the NFL would seek such a charge. In any event, no claim of harm other than a passing psychic injury to otherwise robust counsel is made.

> In addition, in 1961 Congress passed a statute that provides that a contract between a professional sports league and a television network for the sale of pooled telecast rights is not a restraint of trade in violation of the antitrust laws.
>
> Accordingly, I instruct you that the making of these contracts by the NFL with the television networks constitutes the lawful acquisition of power, [e]ven if you were to find that these contracts gave the NFL monopoly power, *unless you found that the intent and effect of these agreements is to exclude a competing league or its members from selling any of their television rights.*

(emphasis added). This instruction was consistent with the Sports Broadcasting Act, discussed *infra,* as exempting from antitrust scrutiny a league's pooled-rights contracts with networks unless they constitute illegal monopolization or an unreasonable restraint of trade so far as competing leagues are concerned. More importantly, the intent-*and*-effect charge was consistent with the legal standards for illegal monopolization under Section 2.

The Supreme Court has repeatedly defined monopolization as the "willful acquisition or maintenance" of monopoly power. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 596 n. 19, 105 S.Ct. 2847, 2854 n. 19, 86 L.Ed.2d 467 (1985); *United States v. Grinnell Corp.,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 274 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). The willfulness element certainly requires proof of intent. *See Aspen Skiing,* 472 U.S. at 602 n. 28, 105 S.Ct. at 2858 n. 28 (quoting *United States v. Aluminum Co. of Am.,* 148 F.2d 416, 432 (2d Cir.1945) (*"Alcoa"*) (In order to fall within § 2, the monopolist must have . . . the intent to monopolize.")). Proof of effect is required by definition alone to satisfy the "acquisition or maintenance" requirement.

A requirement that both intent *and* effect be proven is necessary to enable a trier of fact to make the critical distinction between conduct that defeats a competitor because of efficiency and consumer satisfaction, and conduct that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing,* 472 U.S. at 605 n. 32, 105 S.Ct. at 2859 n. 32 (quoting 3 P. Areeda & D. Turner, *Antitrust Law* 78 (1978)). Hopes and dreams alone cannot support a Section 2 claim of monopolization. *Berkey Photo,* 603 F.2d at 273-75. If they did, the nationwide advertisement "Ford wants to be your car company" would constitute an open-and-shut Section 2 case. Success alone is not enough or the antitrust laws would have their greatest impact on the most efficient entrepreneurs and would injure rather than protect consumers.

Proof of intent *and* effect is also of evidentiary value. Distinguishing between efficient and predatory conduct is extremely difficult because it is frequently the case that "[c]ompetitive and exclusionary conduct look alike." Easterbrook, *On Identifying Exclusionary Conduct,* 61 Notre Dame L.Rev. 972, 972 (1986). Evidence of intent *and* effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.[21] As Justice Stevens stated in *Aspen Skiing,*

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[21] The USFL contends that the district court improperly added a specific intent requirement to Section 2 by instructing the jury that it "should infer no anticompetitive intent from the mere existence of" the NFL's three network contracts. This argument is groundless. The quoted language simply restated the district court's holding in its *Opinion No. 2* interpreting the Sports Broadcasting Act of 1961. In any event, the district court instructed the jury that "[m]onopoly power is obtained intentionally and this element is satisfied, if defendants acquired by means other than superior skill or historical accident" or "by any means of wielding monopoly power to prevent or impede competition." This instruction applied to both the professional football market and television sub-market claims and fully complied with *Alcoa*'s requirement of only general intent for a monopolization violation. *See* 148 F.2d at 432. The usefulness in this area of the distinction between specific and general intent, moreover, may be dimin-

> [E]vidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive"—to use the words in the trial court's instructions—or "predatory," to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious of what he is doing." As Judge Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."

472 U.S. at 602-03, 105 S.Ct. at 2857-58 (quoting R. Bork, *The Antitrust Paradox* 160 (1978)).

The present case is in fact a useful example of the intent-*and*-effect approach to determining whether certain practices are predatory. As the preceding discussion of the "dilution effect" indicates, the jury's conclusion that the NFL's three network contracts were not exclusionary was supported by evidence that a quality league could either have overcome the "dilution effect" or have acquired a contract when the NFL's contracts expired. The conduct of the NFL itself and the networks showed their disbelief in any exclusionary effect by the NFL's threatening to leave a network without NFL games and the networks' taking the threat seriously. The evidence also supported the conclusion that when the NFL locked up the third network, CBS, in the 1982 negotiations, it did so to obtain $736 million in rights fees, not to exclude competitors.

Judge Leisure's instructions to the jury with respect to the Section 1 Rule-of-Reason claim stated that intent was not determinative as to whether a practice was an unreasonable restraint of trade:

> Examining the combination's purpose may assist you in determining the effects of the agreement on competition. The mere fact that the defendants had a good mo-

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ished by *Aspen*'s description of the intent requirement as an evidentiary tool to evaluate business conduct.

> tive or sound purpose for entering into an agreement, however, does not in and of itself prevent you from finding that the agreement was an unreasonable restraint of trade.
>
> On the other hand, the mere fact that defendants entered into an agreement with the intent of excluding competition, is not enough to establish a Section [1] violation. Even if you find that defendants' intent was evil or unlawful, you still must find evidence of anticompetitive effect before you can find a particular restraint of trade is unreasonable.

We disagree with the USFL that proof of either anticompetitive intent *or* effect is sufficient in a Rule-of-Reason case under Section 1. Unlike a *per se* price-fixing case, a Rule-of-Reason case requires the fact finder to balance the procompetitive and anticompetitive *effects* of any restraint. *See, e.g., National Soc'y of Professional Eng'rs v. United States,* 435 U.S. 679, 691 & n. 17, 98 S.Ct. 1355, 1365 & n. 17, 55 L.Ed.2d 637 (1978). Except for *Oreck Corp. v. Whirlpool Corp.,* 579 F.2d 126, 133 (2d Cir.) (in banc), *cert. denied,* 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978), the cases cited by the USFL are *per se* price-fixing cases. We have previously stated, however, that we "doubt" that the purpose-*or*-effect requirement stated in *Oreck* "is a disjunctive rule," and that "it is difficult to conceive of a viable private action for damages under section 1 if some unreasonable restraint of trade has not been effected." *Borger v. Yamaha Int'l Corp.,* 625 F.2d 390, 397 & n. 4 (2d Cir. 1980). Other courts agree, *see, e.g., Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.,* 710 F.2d 1366, 1372-73 (9th Cir.1983); *Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1202-03 (6th Cir.1982); *H & B Equip. Co. v. International Harvester Co.,* 577 F.2d 239, 246 (5th Cir.1978), and we now hold, for reasons stated in our discussion of the Section 2 claim, that an anticompetitive effect must be shown to make out a Section 1 Rule-of-Reason violation.

d. Legitimate Business Opportunities and Profit-Maximization Charge

The USFL further argues that the district court erroneously charged the jury that the NFL's three network contracts were lawful if motivated by any "legitimate" purpose, including profit maximization. The pertinent charge reads as follows:

> Plaintiffs allege that the NFL coerced the networks not to give the plaintiffs a contract. . . . So long as they have a legitimate business purpose in doing so, defendants have no duty to limit themselves in entering into the television contracts so that other football leagues would have an easier time entering the market, or to foresee that other leagues might do so, or for any reasons to decline a profitable business opportunity.

This charge was consistent with settled precedent. "[A] firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir.1986), *cert. denied*, – U.S. –, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987); *see Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir.1986); *Berkey Photo*, 603 F.2d at 274, 276, 287. A monopolist may not, of course, use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market. *See Aspen Skiing*, 472 U.S. at 605, 105 S.Ct. at 2859; *Berkey Photo*, 603 F.2d at 274. The jury was thus properly instructed that:

> A monopoly achieved or maintained as a result of . . . legitimate good business practices is not unlawful. A monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers. At the same time, a monopolist cannot use its lawfully acquired power to maintain its monopoly.
>
> In addition, there is nothing in the antitrust laws that requires a monopolist to act against its own self interest

> so long as the monopolist does not at the same time exercise its power to maintain that power. Thus, a monopolist is under no duty affirmatively to help or aid its competitors and is free to set as its legitimate goal the maximization of its own profits so long as it does not exercise its power to maintain that power.

The USFL challenges this charge on the ground that setting prices at a profit-maximizing level is an anticompetitive act. We disagree. Prices not based on superior efficiency do not injure competitors, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83, 106 S.Ct. 1348, 1354, 89 L.Ed.2d 538 (1986), but rather invite competitive entry. As we stated in *Berkey Photo:*

> Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can.

603 F.2d at 294. The USFL responds to this argument by falling back on its claim that professional football is not a typical market because of the "dilution effect," an argument rejected by the jury and discussed *supra*.

e. Television Submarket Definition

Regarding the relevant television submarket, the district court instructed the jury, first, to determine who were the potential purchasers of television broadcast rights for professional football in the fall. The jury was then, second, to determine from the perspective of those buyers what other products, if any, were reasonably interchangeable with broadcast rights to professional football. The USFL claims in particular that, in instructing the jury to determine who were potential purchasers, the district court erred by stating that:

> If you find that a professional football league would reasonably consider selling its broadcast rights to cable television companies or to individual television stations, then all those buyers must be included in the relevant submarket.

We do not agree with the USFL that this charge was error because it emphasized the view of potential buyers in determining the relevant submarket. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956); *see also United States v. Waste Management, Inc.*, 743 F.2d 976, 979-80 (2d Cir.1984) (defining relevant market by first determining potential buyers and then determining what products were reasonably interchangeable from buyers' perspectives); *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1016-17 (9th Cir.), *cert. denied*, 464 U.S. 829, 104 S.Ct. 106, 78 L.Ed.2d 109 (1983). The fact that a cable contract might be less desirable, even much less desirable, to a league than a network contract is not relevant to determining the product submarket.

In any event, the USFL never objected to the relevant submarket instruction, and the objection was thus waived under Fed.R.Civ. P. 51. Contrary to its claim on appeal, the USFL did not "distinctly" object to this instruction, but merely proposed changes in language in the draft charge. These suggestions did not constitute a general objection to the entire charge. Indeed, the district judge expressly stated his understanding that the parties had objected only "*to the extent* [of] proposed changes in the charge" (emphasis added). This was apparently the understanding of the USFL as well because the league raised a "general objection" to the intent-*and*-effect charge.

f. The Supplemental "Unambiguous Evidence" Charge

The USFL also challenges the supplemental "unambiguous evidence" instruction given by Judge Leisure in response to a note from the jury. The note sought guidance as to what the jury should do if it were to define a television market or

submarket broader than the market alleged by the USFL. The supplemental instruction stated in part that:

> If you answer the second part of Question 3 [possession of monopoly power in the relevant submarket] in terms of your own broader definition of a relevant market or submarket, then I must also instruct you that you may only find that the NFL has monopoly power in this broader submarket if plaintiffs have produced unambiguous evidence that the defendants have the power to control prices or exclude competition in this broader market. Unambiguous evidence is evidence of a kind which is so clear that it supports only one conclusion.

The USFL contends that the instruction concerning a need for unambiguous evidence of the power to control prices or exclude competitors should not have been given.

An "unambiguous evidence" instruction regarding the power to control prices or to exclude competition is appropriate where market share data for the relevant market is lacking. *See Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 130 (2d Cir.) ("when such a traditional form of proof [as market share data] is lacking, the plaintiff must produce unambiguous evidence that the defendant has the power to control prices or exclude competition"), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981). Absent market share data, definite evidence of monopoly power is needed lest profitability alone provide a basis for antitrust liability.

The parties' arguments on this point are based on differing assumptions as to what the jury actually did with regard to the submarket definition. The USFL assumes that the relevant submarket found by the jury was the sale of broadcasting rights for professional football in the fall to the networks, cable and syndicators. Because there was market share data for that submarket—during 1983-86, for example, $1.7685 billion in revenue to the NFL, $65.9 million to the USFL—it understandably concludes that the "unambiguous evidence" supplemental instruction was error. The NFL assumes that

the relevant submarket found by the jury was the sale of broadcasting rights for professional football, other sporting events and television programming generally to the networks, cable and syndicators. Because no meaningful market share data was introduced for that much broader submarket, the NFL understandably concludes that the supplemental instruction was eminently correct. These differing assumptions require us to examine certain events at trial in some detail.

The pertinent portion of the submarket instructions reads as follows:

> In this case plaintiffs allege the existence of a relevant submarket in the nationwide market for the sale of network television broadcasting rights for major league professional football games in the fall.
>
> Defendants dispute plaintiffs' definition of the relevant submarket in at least two respects. First, the defendants contend that the buyers of broadcast rights are not limited to television networks. Instead, they say that football leagues and others who sell programs to be televised to the public can and do sell them to other buyers, such as individual television stations, through the process of syndication, and cable television companies, such as ESPN or Turner Broadcasting. If you find that a professional football league would reasonably consider selling its broadcast rights to cable television companies or to individual television stations, then all those buyers must be included in the relevant submarket.
>
> Second, the defendants say that the relevant submarket is not limited to the sale of rights to telecast professional football in the fall, but should instead include the sale of broadcast rights for other sports programming, such as college football, and for other general entertainment programming. In order for plaintiffs to prove that their definition of the relevant submarket is correctly limited to the sale of broadcasting rights for professional football in the fall, plaintiffs must show that the purchasers of those rights did

not regard other types of programming as reasonably interchangeable substitutes for professional football.

In other words, you have to decide whether, based on all the evidence you have seen and the testimony you have heard, whether broadcasting rights to professional football in the fall compete as a product with broadcasting rights for other sporting events and other television programming. If you find that such competition does exist, then you have necessarily found that the relevant submarket is broader than the plaintiffs have alleged. If, on the other hand, you find that the sale of broadcasting rights for professional football in the fall is a specific universe, and that the buyers of those rights do not have reasonably interchangeable substitutes, then you have necessarily found that plaintiffs are correct in having limited the relevant submarket to the sale of broadcasting rights for professional football in the fall.

The jury was thus asked to undertake the following tasks: (i) determine whether buyers in the submarket include cable and syndicators as well as the networks, and (ii) determine whether those buyers regard the broadcasting rights to professional football in the fall as reasonably interchangeable with broadcasting rights to other sporting events and other programming. However, the interrogatory on the verdict sheet asked only:

2. Is there a relevant market or submarket, as alleged by plaintiffs, consisting only of the sale to the networks of television broadcasting rights for major league professional football in the Fall?

YES ____ NO ____

What appears to have been overlooked by counsel and the district court is that while the answer "YES" would complete the jury's tasks, the answer "NO" might not. A "NO" answer would leave unresolved the question of whether the relevant submarket was the sale of broadcasting rights to football to networks, cable and syndicators, or the sale of

broadcasting rights to programming generally to networks, cable and syndicators. After it in fact decided to answer interrogatory 2 "NO," the jury thereupon sent a note asking for guidance as to what it should do next.

A colloquy took place over the proper response to the jury's question. The NFL took the position that a "NO" answer to the interrogatory obviated the need for the jury to answer any further interrogatories concerning monopolization of the television submarket. The USFL argued that the jury must go on to answer the questions concerning monopolization of whatever submarket it did find. Counsel for the USFL thus stated:

> MR. MYERSON: What the jury is saying is that if they find that the submarket is broader than sale by networks of television broadcasting rights for major league professional football, do they necessarily have to answer no to the question of did defendants willfully acquire or obtain monopoly power in either of the relevant market or submarket. And they say, or can we instead use our broader definition of what the relevant submarket is and answer whether or not the defendants have willfully acquired or maintained monopoly power in the relevant submarket.
>
> To follow Mr. Fiske's argument, what Mr. Fiske is asking the court to say is that you automatically must answer no, the defendants did not willfully acquire or maintain monopoly power in the relevant submarket merely because they find that the relevant submarket is broader than broadcasting rights for major league professional football. And what we are saying to the court is that, as your Honor has already instructed, the relevant submarket may be broader, and then and obviously then when they define the relevant submarket do they answer the question 4: "Did defendants willfully acquire and maintain monopoly power in the relevant market or submarket?"
>
> And in 5, did the defendants' monopolization of the relevant market cause the injury, and in 6, etc. But to take the position that we lose the opportunity for the jury to say

whether or not the defendants monopolized in a submarket merely because they think that the submarket may be broader than we submit, is inconsistent with your Honor's charge to the jury and to the law.

The jury's province under your Honor's instruction is to determine what they think the accurate submarket is and then to answer the question of whether within their definition of what the accurate submarket is, defendants monopolized or attempted to monopolize in the way set forth in the verdict.

* * * * * *

What the jury is asking is, if the submarket is broader in their view than just network, and presumably includes, as your Honor instructed they could find, cable TV or individual television stations as set forth on page 37, the jury is then saying do we necessarily have to answer no to the question of whether they have monopoly power in that submarket, and for them to argue yes, the jury has to say no because they found a broader submarket goes totally inconsistent and it is the antithesis of what your Honor instructed and what they asked your Honor to instruct over my objection.

What was lost in the verbal traffic over whether the jury should continue to answer questions on the verdict sheet was the fact that the jury had to determine not only whether the relevant buyers included cable and syndicators as well as the networks but also whether those buyers, once determined, would consider rights to fall professional football reasonably interchangeable with rights to other programming. This distinction was of little importance at the time of the colloquy because the "unambiguous evidence" instruction apparently was not yet in the picture.

After a break, during which counsel for the NFL submitted handwritten proposed instructions containing, apparently for the first time, the "unambiguous evidence" charge, the court reconvened outside the presence of the jury. The district

judge offered the parties a chance for a side-bar discussion that was not accepted, although the challenged instruction was now on the table. He thereupon called in the jurors and told them that they should go on to answer the other questions relating to the television submarket even if they redefined that submarket. He then gave the "unambiguous evidence" instruction. No exception to that charge was taken at that time.

Fifteen minutes later, the jury came in with another question, and at that point the USFL objected to the supplemental instruction with regard to "unambiguous evidence." The district judge expressed mild surprise because he believed the instructions quite favorable to the USFL in allowing the jury to continue to answer questions concerning the submarket. Counsel for the USFL stated:

> MR. MYERSON: [T]he applicable authorities, as plaintiffs have read them, stand for the proposition that the unambiguous evidence instruction is reached only in the absence of market share data, and it is plaintiffs' position, as the court is aware, that there is market share data even on the broader submarket that includes other forms of TV, and including ESPN, cable, etc., and with respect to even a broader submarket, including ESPN, cable, etc., there is market share data in the record showing an NFL share higher than 90 percent, and for that reason we object to the charge given by your Honor.

Counsel for the USFL did not bring to the district court's attention the distinction between a submarket consisting of the sale of broadcasting rights to fall professional football to the networks, cable and syndicators, and a submarket consisting of the sale of broadcasting rights to programming generally to the networks, cable and syndicators. This was not an insignificant omission because an objection based on the proffered market share data had no merit whatsoever with regard to the broader market and the various colloquies leading up to the objection had served to blur what had now become a critical distinction.

The USFL was entitled at best to an instruction that monopolization of the narrow submarket could be found after resort to ordinary evidentiary principles. Such an instruction would have to be accompanied, however, by a further statement that monopolization of the broad submarket could be based only on "unambiguous evidence." The broad objection made by the USFL to the supplemental instruction did not, therefore, bring to the attention of the district court a valid claim of error, and a more precise claim cannot be raised on appeal. *See* Fed.R.Civ.P. 51 (counsel must state to district court "distinctly the matter objected to and the grounds of objection").

We also note that it is not at all clear that the jury determined the relevant submarket to be the narrow market for broadcasting rights to fall professional football. After the jury went back to its tasks, it arrived at a verdict that we reproduce in pertinent part.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES FOOTBALL LEAGUE, *et al.*,	§	
Plaintiffs.	§	JURY VERDICT
	§	SHEET &
-against-	§	INTERROGATORIES
	§	
NATIONAL FOOTBALL LEAGUE, *et al.*,	§	84 Civ. 7484 (PKL)
Defendants.	§	

We, the jury, unanimously make the following findings and render the following verdicts with respect to each of the claims alleged in this case:

RELEVANT MARKET

1. Is there a relevant market, as alleged by plaintiffs, consisting of major league professional football in the United States?

YES ____ NO ____

The burden of proof is on plaintiffs to prove by a preponderance of the evidence that the anwer is "yes".

2. Is there a relevant market or submarket, as alleged by plaintiffs, consisting only of the sale to the networks of television broadcasting rights for major league professional football in the Fall?

YES ____ NO ____

The burden of proof is on plaintiffs to prove by a preponderance of the evidence that the answer is "yes".

2A. We the jury have redefined the relevant submarket to include not only the sale to the networks of TV broadcasting rights but also to include cable and syndication.

_____

SHERMAN ACT SECTION 2

A. *Actual Monopolization*

Answer Question 3 *only* if you have answered "yes" to either Questions 1 or Question 2, or both.

3. Does the NFL have monopoly power, that is, the power to control prices or exclude competition in either the relevant market or submarket?

(Check the market or submarket, if any, you have found to exist and then answer this question only as to such market, or submarket, or both):

_____ In a relevant market consisting of major league professional football in the United States?

Yes _____ No _____

_____ In a relevant market or submarket consisting only of the sale to the networks of television broadcasting rights for major league professional football in the Fall?

Yes _____ No _____

The burden of proof is on plaintiffs to prove by a preponderance of the evidence that the answers are "yes".

No party made an application to clarify the verdict. If the handwritten redefinition of the submarket in "2A" included only the sale of broadcasting rights to major league professional football in the fall, then the "unambiguous evidence" instruction may have misled the jury in answering the second part of question No. 3, even though the printed statement regarding the burden of proof would tend to counteract it. If "2A" included the sale of broadcasting rights to programming generally, then the supplemental instruction was correct.

We believe the redefinition of the submarket stated in "2A" is ambiguous and cannot be determined on the present record. If one looks at the handwritten redefinition in isolation, the failure to modify the words "broadcasting rights" would imply the broadest definition, or television programming generally. If one looks at page one of the verdict sheet in isolation, it might appear that the jury omitted solely for the sake of convenience the words from question No. 2 immediately above "for major league professional football in the Fall." However, neither the handwritten redefinition nor the verdict sheet can be viewed in isolation. The jury had a copy of the charge in the jury room and the words "broadcasting rights" were used in that charge to describe each of the relevant submarkets. Indeed, the second paragraph of the portion of the television submarket charge quoted above specifically mentioned sales to cable and syndicators by "others [besides football leagues] who sell programs to be televised." We cannot assume that the jury believed that "broadcasting rights" was a short-hand term for professional football rights only.

We therefore cannot say that the jury's failure to include a modifying phrase providing a full description of the broadcasting rights represented a rejection of the NFL's contentions with regard to the broader submarket of television programming generally. We believe the failure of the USFL to seek clarification of the verdict, in addition to its failure to make a precise objection to the supplemental instruction, precludes it from claiming error now.[22] Courts have held that a party's failure to bring alleged inconsistencies in the verdict sheet to the court's attention before the jury has been dis-

[22] We are aware that the NFL described the redefined market as being limited to the sale of broadcasting rights to football in a posttrial memorandum. *See* Memorandum of Law in Opposition to Plaintiffs' Request for Permanent Injunctive Relief at 33. The point being made, however, was in no way dependent on how the submarket was defined, and we see no reason to bind the NFL to that statement. As stated in the text, someone looking solely at the verdict sheet would reach that conclusion. In any event, the question is whether an adequate exploration of the issue was made before the district judge.

charged waives the right to have the alleged inconsistencies remedied by a new trial. *See, e.g., Strauss v. Stratojac Corp.*, 810 F.2d 679, 682-83 (7th Cir. 1987); *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1423 (10th Cir.), *cert. denied*, —U.S.—, 107 S.Ct. 647, 93 L.Ed.2d 702 (1986); *Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir.1982), *aff'd*, 462 U.S. 650, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir.1974). We believe that similar considerations justify application of doctrine of waiver where, as here, the jury returns an ambiguous verdict and counsel fails to seize the opportunity to raise an appropriate objection.

In any event, we believe it highly unlikely that the jury's verdict was affected by the events described above. Neither the USFL's Rule-of-Reason claim nor its essential-facilities claim was affected by the redefined submarket or the "unambiguous evidence" instruction. Nevertheless, the jury rejected the USFL's contentions regarding the NFL's network television contracts in both those claims. Given the common evidentiary basis for all the USFL's television claims described *supra*, it is most improbable that the "unambiguous evidence" instruction affected the jury's verdict on question No. 3 even if the submarket included only broadcasting rights to football.

g. Consumer-Satisfaction Charge

The district judge also charged that in considering whether the NFL had engaged in anticompetitive conduct, the jury might "consider . . . whether in a freely competitive market there would be any dissatisfaction with the present choices on the part of the buyers" or "whether or not the choices of those who purchased the rights to show or televise football have been restricted." This instruction was correct. An inquiry into consumer preference is obviously relevant to a determination of whether a monopolist has engaged in predatory conduct. *See Aspen Skiing*, 472 U.S. at 605, 105 S.Ct. at 2858. Given the USFL's vigorously pressed claim that the NFL coerced the networks not to televise USFL games, it

was entirely proper to allow the jury to consider whether the networks eschewed USFL fall contracts because of NFL coercion or because they were satisfied with the NFL's product.

h. Essential-Facilities Charge

Finally, the USFL contends that it was held to an improperly high standard of proof on its "essential-facilities" claim. We set out the pertinent charge:

> Plaintiffs allege that defendants violated Sections [1] and [2] of the Sherman Act by conspiring to and in fact denying plaintiffs access to a satisfactory national broadcast television contract for future seasons, with any one of the three networks. The legal basis for this particular claim by plaintiffs is that a network contract is an essential facility which the USFL or any other professional football league needs in order to compete in major league professional football.
>
> You should only consider this claim if you have already found, pursuant to my earlier instructions, that defendants possess monopoly power in a relevant market or submarket. If you have not found that defendants possess monopoly power, you must return a verdict in defendants' favor on this claim.
>
> In order to prove their essential "facilities" claim, plaintiffs must prove all of the following elements by a preponderance of the evidence:
>
> First: That a national broadcast television contract with at least one of the three networks, CBS, NBC or ABC is essential to the ability of a professional football league to compete successfully in the United States;
>
> Second[:] that potential competitors of the NFL cannot as a practical matter, duplicate the benefits of a network contract;
>
> Third: That the defendants control access to each of the three networks, that is, the defendants themselves have the ability by their actions to deny actual or potential competitors, such as the USFL, access to national broadcast

television—access to a national broadcast television contract;

Fourth: That the defendants through their actions have exercised their ability to deny actual or potential competitors access to a national broadcast television contract by denying the USFL such access;

Fifth: That a national broadcast television contract between one or more of the networks and a professional football league other than the NFL would not interfere with any of the defendants' lawful dealings with those networks.

The USFL argues first that this charge erred in failing to distinguish between a network television contract in the spring and one in the fall. The charge did, however, address the USFL's denial of "access to a *satisfactory* national broadcast contract for future seasons" (emphasis added). The jury was well aware of the USFL's claim that a spring contract was unsatisfactory as an "inferior facility" or "minor league." It thus either rejected that characterization of spring football or rejected the USFL's claim that the NFL could deny the USFL access to a network in the fall. The spring-fall issue was thus before the jury.

The USFL next claims that it was error for the district court to require a showing of monopoly power in a relevant submarket or market before considering the essential-facilities claim. We fail to see why the USFL challenges this instruction because the jury did find monopoly power in a relevant market and therefore *did* consider the essential-facilities claim. Had the challenged instruction been omitted, the verdict would have been exactly the same.

Finally, the USFL claims that the district court erred by instructing the jury that one element of an essential-facilities claim is that an antitrust defendant "control access" to the facility. In the USFL's view, this element requires a showing only of "defendants' contribution to the prevention of plaintiffs' access to the facility." The requirement that the defendant control access to the facility is established in the caselaw, *see, e.g., MCI Communications Corp. v. AT & T Co.*, 708

F.2d 1081, 1132 (to establish liability under the essential facilities doctrine, plaintiff must prove defendant's "control of the essential facility"), *modified on other grounds,* 1983-2 Trade Cas. (CCH) ¶ 65,520 (7th Cir.), *cert. denied,* 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), and is necessary because an essential-facilities claim must be brought against the party that can provide access to the facility.

2. *The District Court's Evidentiary Rulings*

a. The USFL's Merger Strategy

The USFL vigorously contends that the NFL's introduction of evidence of its merger strategy enabled the NFL to present an impermissible *in pari delicto* or unclean-hands defense under the guise of damage causation. This claim is frivolous.

It is true that a plaintiff's own anticompetitive conduct generally cannot be raised as a defense to liability in an antitrust action. *See Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968) (rejecting *in pari delicto* defense that plaintiff's participation in challenged scheme barred recovery); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951) (rejecting unclean-hands defense based on plaintiff's involvement in unrelated conduct). The defense may be available, however, when the plaintiff was present at the creation and had a complete and continuing involvement in the monopolization scheme. *See Perma Life,* 392 U.S. at 140, 88 S.Ct. at 1985; P. Areeda & D. Turner, *Antitrust Law* ¶ 348c (1978).

Whatever its force or content, the *in pari delicto* defense was never interposed by the NFL, and the evidence in question was quite properly admitted as relevant to causation and damages. Stretching dictum in *Perma Life* beyond recognition, the USFL misreads that decision to proscribe the introduction of evidence that might "prejudice the jury improperly into evaluating 'the relative moral worth of the parties.'" USFL Reply Br. at 14 (quoting *Perma Life,* 392 U.S. at 139,

88 S.Ct. at 1984). Neither *Perma Life* nor *Kiefer-Stewart* suggests that otherwise readily admissible evidence must be excluded because it might also be relevant to an *in pari delicto* or unclean-hands defense. In fact, *Perma Life* explicitly states that such evidence "can of course be taken into consideration in computing damages." 392 U.S. at 140, 88 S.Ct. at 1985; *see also First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1175 (9th Cir.) (plaintiff's anticompetitive conduct could be introduced "to disprove part or all of the claimed damages"), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F.Supp. 1122, 1131 (S.D.Tex.1976) ("evidence introduced by defendant of such conduct, if any, by a plaintiff which heretofore was labeled as *'in pari delicto'* now is appropriate when it provides rebuttal to that plaintiff's allegations of causation of injury be defendant and resulting damages therefrom"). Such evidence also can be used for purposes of impeachment. *See Memorex Corp. v. IBM Corp.*, 555 F.2d 1379, 1384 n. 8 (9th Cir.1977).

As with any evidence, therefore, the district judge had broad discretion to determine whether the probative value of the evidence of a merger strategy was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403. His decision that evidence of business decisions made by the USFL pursuant to the merger strategy was highly relevant to the issues of causation and damages and not outweighed by any prejudicial effect was clearly correct. This evidence was highly probative on the central issue of whether the USFL's alleged injury and damages, particularly with regard to its failure to obtain a fall network contract, were caused by the NFL's anticompetitive conduct or by the USFL's own deliberate business judgments. *See, e.g., Costner v. Blount Nat'l Bank*, 578 F.2d 1192, 1195 (6th Cir.1978); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 983 (5th Cir.1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); *Borger v. Yamaha Int'l Corp.*, 625 F.2d at 399.

For example, Eddie Einhorn, the USFL owner who was to represent the USFL in negotiations with the networks for a fall contract, warned his fellow owners at a meeting in August 1984:

> We're starting to look for merger cities. Let's be honest about it. We're getting out of certain cities because we don't—they're getting taken in by the other League, and we're looking for merger cities. We've got to get it on the table tomorrow or this afternoon and start looking at this damn thing. I have the television; I got other problems.
>
> You can't get out of all the cities ahead of time because then you got no TV markets left. It's one of these chicken and egg deals. It's great to get out of them if we're absorbed; but if you're going to exist and need someone else to pay us television money, we can't get out of every city we've got here and just move into cities that aren't in the NFL or we're not going to have any product.

It quite simply defies logic for the USFL to assert on the one hand that it was denied a network contract indispensable to its survival because of the NFL's anticompetitive acts and to argue on the other for exclusion of evidence that the owners of USFL franchises knowingly lessened the value of their product to television. Courts do not exclude evidence of a victim's suicide in a murder trial.

To take another example, USFL Commissioner Usher testified that the USFL suffered a "tumbling" of teams and abandoned its spring season because NFL "pressure" caused ABC to withhold broadcast rights payments and to reject any proposal to televise the USFL. He further stated that the USFL sought competition between, rather than a merger of, the leagues, and that NFL pressure forced the USFL to move its teams from highly-rated television markets into low-rated non-NFL markets. Given that testimony, Judge Leisure would have erred had he not concluded that:

> certain of Usher's answers . . . put in issue the *fact* of the merger motive . . . [t]hus . . . put[ting] in issue plaintiffs' theory that the cause of the moves to the [non-NFL] cities

was NFL conduct. In addition, Usher has put in evidence the state of mind of the USFL owners who, he claims, moved the teams because of NFL competitive pressures.

The proffered trial exhibits . . . suggest that the reason the USFL decided to move those teams was to position the league for a merger. Certainly, if Usher claims that the basis for the USFL owners' decisions for [moving] the teams was by reason of NFL conduct, the NFL should be entitled to show that there is evidence that suggests that the USFL owners had a different motive.

Moreover, it was clearly proper for the NFL to use evidence of this strategy for impeachment purposes. *See Memorex*, 555 F.2d at 1384 n. 8. Although the USFL's desire to exclude this evidence is understandable, its own claims made it inevitable that the merger strategy and its resultant effect on the USFL's value as a television product would become an issue at trial. Indeed, the door was ajar to such evidence as early as the USFL's counsel's opening statement, in which he outlined the USFL's television claims. *See United States v. Bari*, 750 F.2d 1169, 1180 (2d Cir.1984) (door may be opened through counsel's opening statement), *cert. denied*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985).

Judge Leisure correctly circumscribed the uses to which the evidence of a merger strategy was put and gave a limiting instruction to the jury four times. In part, that limiting instruction stated that "the nature of plaintiffs' conduct must have no bearing on your evaluation of whether the defendants did anything in violation of the antitrust laws."[23] We

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[23] The full limiting instruction was as follows:

You have heard arguments presented by counsel and questions asked of witnesses which have brought to your attention the allegation that in some respects plaintiffs . . . may have had a motive to attempt to force a merger with the NFL in one of several ways. . . . Any arguments that suggest that such conduct is unethical or somehow improper, are themselves inappropriate in this type of case, and in the context of this lawsuit. Whether plaintiffs . . . may have pursued such conduct is irrelevant to the issue of whether the defendants here on trial engaged in any anticompetitive con-

have on "numerous occasions" found that such "an instruction was sufficient to enable the jury to limit its consideration of the evidence to the purpose for which it was offered." *United States v. Siegel,* 717 F.2d 9, 18 (2d Cir. 1983).[24]

Finally, we reject the USFL's claim that particular items of evidence of its merger strategy were inadmissible on other grounds. It was hardly an abuse of discretion to admit USFL owner Myles Tannenbaum's view of the three ways to make money in professional football, namely "tickets, television and triple damages," to show that plaintiffs, after failing in the marketplace, sought to compel a merger through the threat of antitrust litigation. *See Argus v. Eastman Kodak Co.,* 801 F.2d 38, 43 (2d Cir.1986) (relying on evidence that plaintiff had been "searching for the means of entering the antitrust fray"), *cert. denied,* ____U.S. ____, 107 S.Ct. 1295, 94 L.Ed.2d 151 (1987). With respect to the McKinsey & Company report advising against a shift to fall play, Judge Leisure limited its use to showing that advice paid for by, and given to, the USFL owners was not followed. The report was not admitted for the truth of the statements contained therein. *See Siegel,* 717 F.2d at 18.

b. Prior NFL Antitrust Judgments

In his *Opinion No. 3,* Judge Leisure excluded from evidence prior court decisions that found the NFL to have violated Section 1 of the Sherman Act. 634 F.Supp. at 1171-75.

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duct towards the plaintiffs.

Defendants . . . are entitled to show you, however, that certain business decisions may have been the cause of the poor financial health of the USFL. Thus, while plaintiffs contend that they have been injured by defendants' anticompetitive conduct, defendants contend that certain USFL business decisions caused the financial harm to plaintiffs.

But, I must remind you that the nature of plaintiffs' conduct must have no bearing on your evaluation of whether the defendants did anything in violation of the antitrust laws.

[24] The USFL's claim that two jurors were improperly influenced by evidence of the merger strategy despite the district court's limiting instruction must also be rejected. *See* Fed.R.Evid. 606(b) (prohibits use of extrajudicial statements by jurors to impeach verdict).

The USFL contends on appeal that this ruling was error, and that the NFL used this ruling as a "shield"" to present a "good monopolist" defense.

Prior antitrust violations and the history of competition in a market may, in appropriate cases, be admissible to establish market power and intent to monopolize. *See, e.g., United States v. Grinnell Corp.,* 384 U.S. at 576, 86 S.Ct. at 1706; *Lorain Journal Co. v. United States,* 342 U.S. 143, 152-53, 72 S.Ct. 181, 186, 96 L.Ed. 162 (1951). Such evidence also may be admissible to establish the intent, motive and method of a conspiracy under Section 1. *See Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 710, 82 S.Ct. 1404, 1416, 8 L.Ed.2d 777 (1962). In order for the NFL's prior antitrust judgments to be admissible, however, the USFL bore the burden of demonstrating that the conduct underlying those prior judgments had a direct, logical relationship to the conduct at issue in this case. *See Buckhead Theatre Co. v. Atlanta Enters., Inc.,* 327 F.2d 365, 368-69 (5th Cir.) (evidence of prior antitrust judgment irrelevant unless plaintiff introduced evidence that practices complained of in prior case "had an injurious effect upon the plaintiff"), *cert. denied,* 379 U.S. 888, 85 S.Ct. 158, 13 L.Ed.2d 92 (1964); *Bray v. Safeway Stores, Inc.,* 392 F.Supp. 851, 866 (prior antitrust judgment admitted where underlying conduct was same as that alleged in main case) (citing *FTC v. Cement Inst.,* 333 U.S. 683, 705, 68 S.Ct. 793, 805, 92 L.Ed. 1010 (1948)), *vacated per settlement,* 403 F.Supp. 412 (N.D.Cal.1975).

Judge Leisure found that the USFL never made such a showing, and, although we do not fully embrace his reasoning, we agree that the prior judgments should not have been admitted as evidence of a longstanding conspiracy somehow casting light on current alleged illegalities. Two of the decisions in question, *Smith v. Pro Football, Inc.,* 593 F.2d 1173 (D.C.Cir.1978) (invalidating rules for NFL player draft); *Mackey v. National Football League,* 543 F.2d 606 (8th Cir.1976) (invalidating "Rozelle Rule" for compensation of

free agents), are not consistent with our decision in *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir.1987). The three others, *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.) (invalidating NFL Rule 4.3 limiting franchise relocation), *cert. denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984), *later opinion*, 791 F.2d 1356 (9th Cir.1986), *cert. denied*, U.S. ____, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987); *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.) (invalidating rule forbidding franchise owners from owning other professional sports teams), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982), and *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa.1953) (invalidating rules limiting broadcast of games into home territories of other teams), involve difficult antitrust questions that were (and, in circuits other than the place of decision, may still be) fair game for litigation. Accordingly, these cases are at best marginally probative of an ongoing intent to exclude competitors.

Judge Leisure excluded the latter three judgments on the ground that they involved intraleague restraints, whereas the instant litigation involves interleague competition. Although we hesitate to adopt a rule that anticompetitive restraints among competitors can never reveal monopolistic intent toward would-be entrants, we do note that sports leagues raise numerous difficult antitrust questions involving horizontal restraints and group boycotts. The very concept of a league involving separate business entities (teams) requires concerted behavior among them and the exclusion of outsiders. Even the drawing up of a schedule requires that horizontal competitors (teams) conform to jointly made decisions and necessarily excludes others. *See* R. Bork, *The Antitrust Paradox* 332 (1978). Moreover, the antitrust law governing horizontal arrangements among competitors and group boycotts has been fluid. With regard to arrangements among competitors, compare *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940) ("[u]nder the Sherman Act a combination formed for the pur-

pose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*"), with *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979) ("[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints"). With regard to group boycotts, compare *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 709, 3 L.Ed.2d 741 (1959) ("[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden *[per se]* category"), with *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31, 104 S.Ct. 1551, 1567-68, 80 L.Ed.2d 2 (1984) (exclusion of physician from hospital staff privileges not violation of antitrust laws "[w]ithout a showing of actual adverse effect on competition" in product market), and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296, 105 S.Ct. 2613, 2620, 86 L.Ed.2d 202 (1985) (group boycott was not *per se* illegal absent proof that buying cooperative possessed market power).

Accordingly, we are wary of allowing a trier of fact to draw inferences of intent from the outcome of prior lawsuits in an area so fraught with uncertainty and doubt. Our wariness in this regard is enhanced by the fact that the lawsuits most pertinent to the instant action—involving claims by another league or a team in another league—were in fact won by the NFL. *American Football League v. National Football League*, 323 F.2d 124 (4th Cir.1963); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir.1983). The district court thus acted within its discretion in excluding evidence of prior antitrust judgments against the NFL on the grounds that their prejudicial value outweighed their probative value under Fed.R.Evid. 403. *See International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.) ("Whether admitted purely as 'background' evidence or not, evidence of a judicial determination of prior illegal conduct on the part of the defendant cannot help but

have a great emotive impact on a jury."), *cert. denied,* 375 U.S. 820, 84 S.Ct. 56, 11 L.Ed.2d 504 (1963); *see also Bohack Corp. v. Iowa Beef Processors, Inc.,* 715 F.2d 703, 709 (2d Cir.1983) (appellate court reluctant to overturn trial court decision under Rule 403 unless arbitrary or irrational).

We next consider several related evidentiary issues. The USFL claims that a statement by Commissioner Rozelle that the NFL was "in bed with" the City of Oakland should have been admitted. This statement, made during testimony before the Senate Judiciary Committee on a bill that would have given the NFL greater control over franchise relocation, indicated that the NFL had cooperated closely with the City of Oakland during the course of litigation seeking to keep the NFL Raiders in that city. The USFL hoped to use this statement to demonstrate the existence of a conspiracy between the NFL and the City of Oakland to destroy the USFL Invaders in order to bring about the return of the Raiders to Oakland. Judge Leisure again acted within his discretion in ruling that Rozelle's statement did not tend to prove such a conspiracy and that the statement's probative value was thus outweighed by its prejudicial effect because of the need for foundation testimony regaring the Raiders' litigation against the NFL.[25]

Judge Leisure was also well within his discretion in excluding Al Davis's testimony about what Davis called the NFL's "habitual disregard" of antitrust advice. This evidence would have put before the jury the precise evidence of prior antitrust judgments previously and correctly deemed inadmissible. Moreover, Judge Leisure correctly found that this testimony was not admissible "habit" evidence as to "three or four episodes over a 20-year period" was hardly sufficient to "conclude that a pattern of behavior exists with respect to the conduct at issue here." *See G.M. Brod & Co. v. U.S. Home Corp.,* 759 F.2d 1526, 1533 (11th Cir.1985) (error to admit collateral evidence of routine practice that falls short

[25] For similar reasons, exclusion of excerpts from minutes of the Oakland-Alameda County Coliseum Board of Directors was proper.

of "adequacy of sampling and uniformity of response" required by Rule 406). Finally, Judge Leisure properly prevented the USFL from attempting to impeach Commissioner Rozelle through an affidavit of Lamar Hunt, an NFL owner who also owned a professional soccer team. This testimony was hearsay and, if allowed, would have resulted in a "mini-trial about the NASL case [or] about the position Hunt took in that litigation." *See Bari*, 750 F.2d at 1178-79 (no abuse of discretion in refusing to permit cross-examination of witness that would lead to "mini-trial").

c. Legislative Process Evidence

The USFL claims that the district court erroneously excluded evidence relating to the activities of the NFL in Congress. This evidence included (1) the NFL's lobbying activities in connection with the 1961 Sports Broadcasting Act and the 1966 NFL-AFL merger legislation, (2) Congress's motives in enacting this legislation, and (3) Senator Alphonse D'Amato's knowledge of the NFL's use of "pressure" tactics in its congressional lobbying.

Legislative lobbying efforts cannot of course be the basis of antitrust liability. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36, 81 S.Ct. 523, 528, 5 L.Ed.2d 464 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-72, 85 S.Ct. 1585, 1593-94, 14 L.Ed.2d 626 (1965). Evidence of such lobbying may be admitted, however, "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny," *Pennington*, 381 U.S. at 670 n. 3, 85 S.Ct. at 1593 n. 3 (quoting *FTC v. Cement Inst.*, 333 U.S. at 705, 68 S.Ct. at 805), and that evidence is more probative than prejudicial. *Id.*

We address first the exclusion of evidence about the Sports Broadcasting Act and the 1966 merger legislation. The USFL objects to the exclusion of a House Committee Report on the Sports Broadcasting Act, which stated that Congress expected professional sports leagues to institute competitive bidding for their television rights as soon as existing contracts

expired. *See* H.R.Rep. No. 1178, 87th Cong., 1st Sess. (1961). The USFL sought to demonstrate by this report that the NFL had misled Congress by promising to put NFL telecasts (especially of the championship game) up for competitive bidding. Judge Leisure properly ruled that the interpretation of legislative history was not an issue of fact for the jury, *see Stissi v. Interstate & Ocean Transp. Co.*, 765 F.2d 370, 374 (2d Cir. 1985), and that such evidence was otherwise excludable under Fed.R.Evid. 403 as overly prejudicial and confusing.

As to the NFL-AFL merger legislation, the USFL sought to introduce evidence that it was approved in part because the NFL had promised two powerful Louisiana lawmakers that a franchise would be awarded to New Orleans. The district court's refusal to admit such evidence was not an abuse of discretion, and we adopt Judge Leisure's reasoning as set forth in the margin.[26] We also reject the USFL claim with regard to the exclusion of allegedly "doctored" minutes of NFL League meetings. In a pre-trial ruling, Judge Leisure correctly found that these minutes, which were submitted to Congress in connection with the merger legislation, had not been doctored, and that plaintiffs' claim was just a "diversionary tactic."

Finally, we address the district court's exclusion of Senator D'Amato's testimony about the NFL's use of "pressure" tactics in Congress. These tactics allegedly included threats to certain members of the House and Senate to remove franchises from their states and promises to others to move fran-

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[26] The district court found that: (1) "an important aspect of the NFL's purpose in seeking the 1961 exemption was to join the other professional sports organizations in being able to enter into pooled rights television contracts," *Opinion No. 3,* 634 F.Supp. at 1171; (2) one of the terms of the 1966 merger was an increase in the number of teams; (3) at the NFL's request, the merger legislation did not grant the combined league any greater antitrust immunity than existed before the merger; (4) evidence on state of mind as to lobbying that took place fifteen to twenty years earlier was weak; and (5) the evidence was, in any event, merely cumulative. *See generally id.*

chises to their states. The USFL argued that these lobbying activities fell within the "sham" exception to *Noerr-Pennington*. We agree, however, with Judge Leisure that efforts to persuade government officials simply by appealing to their political interests have *Noerr-Pennington* protection. *See Noerr,* 365 U.S. at 142-44, 81 S.Ct. at 532-33; *Mid-South Grizzlies,* 720 F.2d at 784; *BusTop Shelters, Inc. v. Convenience & Safety Corp.,* 521 F.Supp. 989, 995 (S.D.N.Y.1981).

Evidence of lobbying may, as we have already stated, nevertheless be admitted as purpose or character evidence. *See Pennington,* 381 U.S. at 670-71 n. 3, 85 S.Ct. at 1598 n. 3. Judge Leisure thus allowed Senator D'Amato to testify about the Senator's own experience with the NFL's lobbying after formation of the USFL in 1982, but forbade any reference to prior lawsuits or to particular legislation. Senator D'Amato was also not permitted to testify concerning double-hearsay statements made by NFL officials to other members of Congress. Even if these statements could survive a hearsay objection, however, they were properly excluded on two other grounds. First, the testimonial privilege that members of Congress enjoy under the Speech or Debate Clause of the Constitution, art. I, § 6, cannot be waived by another member (in this case, Senator D'Amato). As Judge Leisure stated, the underlying purpose of the Speech or Debate Clause, which is to "protect the integrity of the legislative process by insuring the independence of individual legislators," *United States v. Brewster,* 408 U.S. 501, 507, 95 S.Ct. 2531, 2535, 33 L.Ed.2d 507 (1972), would be "ill-served" if such waivers were permitted. Second, this testimony was properly excluded under Fed.R.Evid. 403 because of its potentially prejudicial impact on the jury.

Finally, with regard to all of the excluded evidence relating to the legislative process, we tend to share the view of the Third Circuit that, "[i]f these allegations are true, . . . they are, perhaps, instructive on the nature of the federal legisla-

tive process. For purposes of [the Sherman Act], however, they are irrelevant." *Mid-South Grizzlies,* 720 F.2d at 784.

d. Examination of Damage Experts

The USFL further claims that Judge Leisure erred by not permitting the cross-examination of Dr. Bruce Owen, the NFL's damages expert, about testimony he gave in unrelated cases. In the cases in question, *Buffalo Broadcasting Co. v. American Society of Composers, Authors & Publishers,* 546 F.Supp. 274, 293 n. 42 (S.D.N.Y.1982) (rejecting testimony of defendant's expert Owen, in part because he had testified as government economist that ASCAP was anticompetitive cartel), *rev'd,* 744 F.2d 917 (2d Cir.1984), *cert. denied,* 469 U.S. 1211, 105 S.Ct. 1181, 84 L.Ed.2d 329 (1985), and *Southern Pacific Communications Co. v. AT & T Co.,* 556 F.Supp. 825 913 (D.D.C.1982) (rejecting testimony of plaintiff's expert Owen, in part because of role as government economist favoring AT & T break-up), *aff'd,* 740 F.2d 980, 740 F.2d 1011 (D.C.Cir.1984), *cert. denied,* 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985), Dr. Owen's testimony was rejected by the district court but vindicated on appeal. *See Buffalo Broadcasting,* 744 F.2d at 931-33 & n. 12; *Southern Pacific,* 740 F.2d at 1000-02. It was well within Judge Leisure's discretion to avoid a confusing and certainly complex digression into two earlier trials and appeals. *See Bari,* 750 F.2d at 1178-79. We note that such a digression is not required by *Walker v. Firestone Tire & Rubber Co.,* 412 F.2d 60, 63-64 (2d Cir.1969), in which the expert in question had given extremely contradictory testimony regarding his qualifications in an earlier unrelated trial. Probing into the qualifications of an expert is a far cry from probing into differing judicial reactions to Owen's prior testimony in totally unrelated cases.

Moreover, the record does not support the USFL claim that the district court allowed the NFL to challenge the USFL's damages case unfairly. Fed.R.Evid 104(a) permits voir dire of an expert witness, where, as here, an expert's testimony involved two industries, professional football and television, and various complex economic models and as-

sumptions. The district court also properly allowed the NFL to question Dr. Cornell about the effect of injunctive relief on the USFL's damages, namely "what effect, if any, . . . a cessation of illegal conduct by defendants would have on plaintiffs' future." This cross-examination did no more than probe Dr. Cornell's direct testimony that future damages were appropriate because the USFL would suffer damage "as long as the particular behavior complained about . . . continues."

e. Miscellaneous Evidentiary Claims

We briefly address the USFL's remaining evidentiary claims. The record contradicts the USFL's claim that it was not permitted to examine New York Jets' owner Leon Hess about his alleged conflict of interest as an NFL owner and ABC director and about statements made by Senator D'Amato and Vincent Tese. The district court also acted within its discretion when it excluded a letter to Hess from Mayor Edward Koch regarding the return of the Jets to New York City, even though Hess's reply was admitted. The Koch letter was excluded on the grounds that it was both hearsay and unduly prejudicial under Rule 403. The doctrine of completeness, Fed R.Evid. 106, does not compel admission of otherwise inadmissible hearsay evidence. *See United States v. Terry,* 702 F.2d 299, 314 (2d Cir.), *cert. denied,* 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983).

Judge Leisure also properly excluded a 1982 letter from the Senate Judiciary Committee to Roone Arledge of ABC regarding sportscaster Howard Cosell's testimony on legislation concerning sports franchise relocation. The USFL claimed that Arledge, at Rozelle's request, had sought to reschedule Cosell's testimony in order to increase the likelihood that the bill would be voted out of committee before Congress adjourned. However, the USFL failed to establish a sufficient foundation for the admission of this letter under the public record exception of Fed.R. Evid 803(8).

In addition, the USFL claims that an exchange of letters in 1970 between then ABC President Leonard Goldenstein and the president of an earlier United States Football League, which never fielded any teams, was improperly excluded from evidence. In his reply, Goldenstein had stated that ABC was not interested in televising another league because it had just signed an NFL contract for Monday Night Football. The USFL hoped to show by this evidence that the NFL's television contracts prevented the networks from broadcasting another league. Judge Leisure, however, acted within his discretion in concluding that the NFL would be unduly prejudiced under Fed.R.Evid. 403 by the admission of these letters and that a proper foundation for this hearsay evidence had not been established pursuant to Fed.R.Evid 803(6). On the other hand, he did admit evidence relating to the WFL's futile attempts to obtain television contracts after Rozelle had testified that he told CBS officials of his "surprise" that Robert Wussler, president of CBS Sports, had attended a meeting with the WFL.

The district court also excluded testimony by Ed Garvey, former head of the NFL Players Association, regarding ABC's unwillingness, without NFL approval, to consider broadcasting touch football games during the halftime of NFL games. Such testimony was clearly irrelevant and misleading with respect to any alleged television conduct by the NFL because it had nothing to do with the USFL or NFL control over the networks. Instead it concerned the production only of NFL games.

Finally, we consider the USFL's asttempt to impeach Tex Schramm of the Dallas Cowboys by showing that his testimony that the unionization of the USFL was never discussed at NFL meetings was false. First, no foundation was laid to introduce handwritten notes of an NFL official allegedly reflecting the comments of an NFL players union official at an NFL meeting. Second, these notes were, as Judge Leisure found, being offered for their truth, not simply for the fact

that the statements were made, and were properly excluded as multiple hearsay under Fed.R.Evid. 805.

3. *The District Court's Damages Instructions*

The USFL contends that it received an award of only $1.00 because of incorrect jury instructions regarding damages. Again, we disagree. Specifically, the USFL challenges the instructions with respect to an antitrust plaintiff's burden of proving the amount of damages and with respect to nominal damages.

a. The $1.00 Award

The jury was given the following nominal damages instruction:

> Just because you have found the fact of some damage resulting from a given unlawful act, that does not mean that you are required to award a dollar amount of damages resulting from that act. You may find, for example, that you are unable to compute the monetary damages resulting from the wrongful act, except by engaging in speculation or guessing, or you find that you cannot separate out the amount of the losses caused by the wrongful act from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the plaintiffs or the plaintiffs' own mismanagement. Or you may find that plaintiffs failed to prove an amount of damages.
>
> You may decline to award damages under such circumstances, or you may award a nominal amount, say $1.

The jury's $1.00 award was consistent with this instruction. The NFL offered much evidence of self-destructive USFL decisions, and the jury's nominal award suggests that it credited this proof, as it was free to do. Moreover, it is now clear that Dr. Cornell's testimony was based on a number of assumptions entailing legal premises that were incorrect or factual conclusions that were rejected by the jury. In

awarding only nominal damages, the jury might reasonably have concluded that the USFL had failed to prove any damages.

b. Nominal Damages in Antitrust Cases

We also reject the USFL's claim that the award of nominal damages in anti-trust cases is somehow "suspect." Other courts routinely approve the award of such damages, *see, e.g., Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n,* 666 F.2d 1130, 1147 (8th Cir.1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982), and the USFL cites no authority holding that nominal damages are impermissible in an antitrust case. It is true that we questioned the award of nominal damages in dictum, *Herman Schwabe, Inc. v. United Shoe Mach. Corp.,* 297 F.2d 906, 909 n. 4 (2d Cir.) ("possibility of awarding nominal damages under §4 of the Clayton Act . . . seems dubious in light of the language of the statute and the Supreme Court opinions"), *cert. denied,* 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962). However, our observations were made in the context of a directed verdict based on the plaintiff's failure to prove damages. The USFL's reliance upon *Schwabe* is, as the district court noted, "remarkably ironic" because the rationale of *Schwabe* would deny the USFL any damages at all. *Opinion No. 16,* 644 F.Supp. at 1053.

c Proof of Antitrust Injury and Damages

We next consider whether the district court properly instructed the jury with respect to an antitrust plaintiff's burden of proving the amount of damages. To recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), an antitrust plaintiff must prove that its injury was, in fact, caused by the defendant's violation of the antitrust laws. *Argus,* 801 F.2d at 41; *MCI Communications,* 708 F.2d at 1161.

Judge Leisure instructed the jury as follows with respect to injury causation:

> [P]laintiffs do not have to prove that the unlawful activity that the defendants allegedly engaged in was the sole cause of their injuries. Plaintiffs meet their burden if they show that the defendants' unlawful facts substantially contributed to their injuries, even though other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to *some* degree resulted from defendants' violation.

(emphasis added). The USFL understandably does not challenge this instruction, which was consistent with established precedent. *See Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1572 n. 9, 23 L.ED.2d 129 (1969); *Litton Sys., Inc. v. AT & T Co.*, 700 F.2d 785, 823 n. 49 (2d Cir.1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). Rather, the USFL challenges Judge Leisure's instruction that the jury could award no damages or one dollar in damages if they found that they could not "separate out the amount of losses caused by [NFL misconduct] from the amount caused by other factors, including perfectly lawful competitive acts and including business decisions made by the [USFL] or the [USFL's] own mismanagement."

The USFL claims that this instruction was incorrect because the NFL should have borne the burden of separating out the amount of USFL losses caused by the NFL's wrongful acts from the amount caused by other factors such as the USFL's unsuccessful merger strategy. It is true that once proof of injury causation has been established, courts have allowed antitrust plaintiffs considerable latitude in proving the amount of damages. Proof of amount of damages thus need not conform to a particular theory or model, *see Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir.1970) (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), cert. denied,* 400 U.S. 1020, 91 S.Ct. 582, 27 L.ED.2d 632 (1971), and ex-

act proof of the amount of damages is not required. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981) (acceptance of "degree of uncertainty" in measure of antitrust damages is necessary because of difficulty of ascertaining "what plaintiff's situation would have been in the absence of the defendant's antitrust violation"). An antitrust plaintiff must thus provide only sufficient evidence to support a "just and reasonable estimate" of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931) (proof of antitrust damages sufficient "if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate").[27]

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[27] Judge Leisure gave an instruction regarding the USFL's lightened burden of proving the amount of damages that was entirely consistent with these rules. Repeating nearly verbatim the instruction set forth in Judge Sand's *Modern Federal Jury Instructions* ¶ 79.02, at 79-57 (1986) (Instruction 79-26), Judge Leisure instructed the jury as follows:

> It might be difficult for you to measure the plaintiff[s'] damages in this case. However, the fact that it might be difficult to determine the amount of the plaintiffs' damages should not prevent you from awarding damages to plaintiffs. The law allows a party injured by conduct which violates the Sherman Act to collect damages even if the evidence does not reflect how those damages are to be calculated with mathematical precision.
>
> This does not mean, however, that you may determine the plaintiff[s'] damages on the basis of mere speculation or guesswork. Rather, you must look to the evidence presented to you and make a fair and reasonable estimate of the plaintiff[s'] damages based on the evidence.

Judge Leisure properly instructed the jury as follows on future changes:

> In this case plaintiffs are seeking not only to recover those damages they allege they have already suffered, but also to recover damages they claim they will suffer in the future as a result of the anticompetitive conduct of defendants that has already taken place and which may take place in the future.
>
> With regard to future damages, you are instructed that such damages are not recoverable if you find that the fact of their accrual is speculative or that their amount and nature is unprovable. On the other hand, if

Whatever latitude is afforded antitrust plaintiffs as to proof of damages, however, is limited by the requirement that the damages awarded must be traced to some degree to unlawful acts. *MCI Communications,* 708 F.2d at 1161.[28] That latitude is thus circumscribed by the need for proof of causation. The Supreme Court emphasized this in *Bigelow* by relaxing the standard for proving amount of damages only after "proof of defendant['s] wrongful acts and their tendency to injure plaintiff['s] business, and from the evidence of the decline in prices; profits and values, *not shown to be attributable to other causes.*" 327 U.S. at 264, 66 S.Ct. at 579 (emphasis added).

A plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate the amount of its losses caused by other factors, such as management problems, a general recession or lawful factors. As the Seventh Circuit stated in *MCI Communications:*

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. . . . To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

708 F.2d at 1162-63. In *MCI Communications,* the court overturned a damages award based on a study that did not allow the jury to alter the award to reflect lawful competition

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you find that you can make a fair and reasonable estimate of plaintiffs' future damages, you may award such damages as you find appropriate, keeping in mind that the damage award need not be calculated with mathematical precision.

[28] The USFL attempts to distinguish *MCI Communications* on the ground that, unlike the instant case, *MCI Communications* involved partial market foreclosure and thus "special proof problems." Even assuming that the instant case is a total foreclosure case, the Supreme Court stated in *Zenith Radio* that the same standards of proof apply whether there is "a partial or total exclusion from a market." 395 U.S. at 123, 89 S.Ct. at 1576.

from AT & T. *Id.* at 1163; *see Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir.1985) (court reversed jury award because of plaintiff's "utter failure to make any segregation between damages attributable to lawful competition and that attributable to [defendant's] unlawful scheme"); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir.1975) ("In the absence of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."); *Southern Pac. Communications v. AT & T*, 556 F.Supp. at 1090 ("[c]ourt must have a basis for assuring itself that other causes of plaintiffs' injury have been 'filtered out' of the damage claim").

The Supreme Court's decisions in *Bigelow* and *Story Parchment* thus do not shift the burden of proving the cause of damages from the plaintiff to the defendant. They simply restate the established principle that where damages have been shown to be attributable to the defendant's wrongful conduct, but are uncertain in amount, the defendant bears the risk of those uncertainties.

4. *The District Court's Denial of Injunctive Relief*

Finally, the USFL claims that the district court should have granted sweeping injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982). In particular, the USFL requested membership in the NFL, separation of the NFL into two leagues, each league being limited to one network, or a prohibition on the NFL from broadcasting its games in more than one afternoon time slot on Sunday. Judge Leisure held that the requested relief was unrelated to the monopolization of the market for major-league professional football verdict and not justified by the record as a whole.

The USFL contends that the jury's monopolization verdict compelled the district court to "pry open to competition [the] market that has been closed by defendants' illegal restraints." USFL Br. at 70 (quoting *Zenith Radio,* 395 U.S. at 133, 89 S.Ct. at 1582). However, this argument simply glosses over the critical fact that the jury did not find the NFL liable on

any of the USFL's television-related claims. With regard to the findings implied by the monopolization verdict that the NFL engaged in predatory conduct through attempts to co-opt USFL owners, creation of a Supplemental Draft, or expansion in roster size, Judge Leisure denied relief on the ground that the USFL provided no evidence that such conduct was likely to continue or recur. The USFL has not asked us to overturn that denial of relief.

Instead, the USFL seeks sweeping injunctive relief on the ground that the NFL's single league structure, in conjunction with television contracts with the three networks, creates an impenetrable barrier to entry by a competing league into the market of professional football. No matter what the jury found, however, such relief would not have been appropriate. First, Congress has authorized the NFL's single-league structure and its joint economic operations. Second, at the time the district court denied the relief, the NFL's contracts with the networks had expired. There was thus no "tie-up" of the three networks and no barrier to entry created by the "dilution effect." There was only free competition between the NFL's product and the USFL's product. Of course, the district court also properly rejected this claim in view of the jury's outright rejection of all of the USFL's television-related claims.

What the USFL seeks is essentially a judicial restructuring of major-league professional football to allow it to enter. Because of the explicit congessional authorization in 1966 for the NFL-AFL merger and single-league operation, the USFL does not attack the league structure directly. Instead, the USFL asks us to prevent networks from broadcasting, and fans from watching, NFL games in the hope that they will turn to the USFL. Absent a showing of an unlawful barrier to entry, however, new sports leagues must be prepared to make the investment of time, effort and money that develops interest and fan loyalty and results in an attractive product for the media. The jury in the present case obviously found that patient development of a loyal following among fans and an

adherence to an original plan that offered long-run gains were lacking in the USFL. Instead, the USFL quickly changed to a strategy of competition with the NFL in the fall, hoping thereby to force a merger of a few USFL teams into the NFL. That led to a movement of USFL teams out of large television markets and a resultant reduction in the value of USFL games to television. As USFL owner and negotiator Einhorn predicted, abandoning major television markets precluded the possibility of obtaining a network contract. The USFL hoped however, that if a merger did not occur, a jury verdict in the instant litigation followed by a decree effectively forcing a network to televise its product would save the day. Instead, the jury found that the failure of the USFL was not the result of the NFL's television contracts but of its own decision to seek entry into the NFL on the cheap.

CONCLUSION

For the foregoing reasons, we affirm the jury's verdict and the judgments entered thereon. We thus need not consider the NFL's conditional cross-appeal.

Affirmed.

Appendix D

Statute Involved

Section 4 of the Clayton Act, 15 U.S.C. § 15 provides, in relevant part, that:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Supreme Court, U.S.
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No. 89-851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

v.

UNITED STATES FOOTBALL LEAGUE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a jury's specific finding that antitrust plaintiffs had been injured by the defendants' unlawful monopoly entitle the plaintiffs to an award of treble damages, costs, and reasonable attorneys' fees under the plain language of Section 4 of the Clayton Act, 15 U.S.C. § 15?

2. Did the Court of Appeals, consistent with Section 4 of the Clayton Act and governing case law, properly hold that the District Court did not abuse its discretion in refusing to reduce the fees requested by antitrust plaintiffs by more than 30%, in light of the time and labor required, the novelty and difficulty of the issues, the skill required of counsel, comparison with customary fees, time limits imposed by circumstances, experience, reputation, and ability of counsel, the results achieved and the plaintiffs' voluntary decision not to seek recovery for almost $2 million of fees and expenses which were reasonably incurred in the course of prosecuting the action?

RULE 28.1 LIST

Pursuant to Rule 28.1, the following corporations are either parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates of any respondent that is a corporation: USFL Holdings, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 28.1 LIST	ii
TABLES OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	4
A. The Litigation On The Merits	4
B. The Fee Award	6
C. The Court of Appeals' Affirmance	8
REASONS FOR DENYING THE WRIT	10
1. The Courts Have Consistently And Properly Awarded Attorneys' Fees To Plaintiffs Like The USFL Who Have Proven Antitrust Injury	10
2. The Award Is Consistent With Public Policy	13
3. The Amount of the Award Is Within the District Court's Discretion	15
A. The District Court Applied The Proper Standard In Evaluating the Fee Application	15
4. The Lower Courts Did Not Err In Their Assessment Of The Issues That Contributed To The USFL's Victory	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	PAGE
Alyeska Pipeline Co. v. Wilderness Soc., 421 U.S. 240 (1975)	11, 12
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	15
Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976)	11, 14
Blum v. Stenson, 465 U.S. 886 (1984)	16, 18
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	13
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	11, 12
City of Riverside v. Rivera, 477 U.S. 561 (1986)	15, 17
Hensley v. Eckerhart, 461 U.S. 424 (1983)	*passim*
Home Placement Service, Inc. v. Providence Journal Co., 819 F.2d 1199 (1st Cir. 1987)	11, 14
Hydrolevel Corp. v. American Soc. of Mechanical Engineers, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982)	11
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)	9, 16
Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc., 845 F.2d 404 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989)	14
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)	14
McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983)	8
Missouri v. Jenkins, 57 U.S.L.W. 4735 (U.S. June 19, 1989)	10
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)	13
Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974)	11

CASES **PAGE**

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 14

Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278 (2d Cir. 1987) 10

Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982) 11

United States v. Locke, 471 U.S. 841 (1985) 13

USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988) 6, 14, 18

USFL v. NFL, No. 1265, August Term, 1988 (2d Cir. 1988) ..... *passim*

USFL v. NFL, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (1988) 6, 18

USFL v. NFL, 704 F. Supp. 474 (S.D.N.Y. 1989) . *passim*

STATUTES

15 U.S.C. § 15 ..... *passim*

15 U.S.C. § 26 12

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ..... 9, 12

OTHER AUTHORITIES

S. Rep. No. 94-1011, 1976 U.S. Code Cong. & Admin. News 5908 8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NATIONAL FOOTBALL LEAGUE, et al.,

Petitioners,

v.

UNITED STATES FOOTBALL LEAGUE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, the United States Football League and certain of its Member Clubs (the "USFL"), respectfully submit this brief in support of their request that this Court deny the petition of the National Football League, *et al.* (the "NFL") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered October 10, 1989.

INTRODUCTION

The NFL's petition for a writ of certiorari does not present any special and important reasons for the Court to review the decision of the United States Court of Appeals for the Second Circuit in this case. The unanimous Second Circuit affirmance applies straightforward and well-settled principles of

antitrust law and the law of attorneys' fees. Its decision is consistent with the decisions of this Court and other circuit courts. Even the NFL does not claim that there is a conflict among the circuits. The case is thus not worthy of review by this Court.

In seeking Supreme Court review, the NFL is attempting to avoid the Congressionally-mandated consequences of a specific jury finding that it illegally monopolized the market for major league professional football in the United States, and that this monopoly injured the USFL. In holding the NFL liable, the jury found (1) that the NFL had willfully acquired or maintained monopoly power in a relevant market consisting of major league professional football in the United States, and (2) that the NFL's unlawful monopoly of the relevant market had caused injury to the business or property of the plaintiffs, the USFL.

In light of these specific jury findings of unlawful monopolization and injury, the Court of Appeals quite properly ignored the NFL's arguments with respect to the USFL's alleged improper motives. This was particularly appropriate given that the NFL's lengthy motion for judgment notwithstanding the verdict was denied by the District Court, and the liability issue was not seriously pursued by the NFL on appeal, with the result that the NFL now stands before this Court as an adjudicated illegal monopolist.

As the lower courts found, Section 4 of the Clayton Act spells out the clear consequences of such findings. Section 4 states: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall recover* threefold the damages by him sustained, and the cost of suit, *including a reasonable attorney's fee*" (emphasis added). As this Court and all other courts to consider this issue have held, the award of attorneys' fees is *mandatory* once these, and only these, findings of unlawful monopolization and injury have been made. There is simply no basis for the NFL's argument that proof of damages is yet an additional requirement. Moreover, although the NFL's

public policy arguments are unpersuasive and irrelevant in light of the plain meaning of the statute, the Court of Appeals quite properly held that "[b]ecause of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney's fees must be sustained regardless of the amount of damages awarded" (A8).[1] As the Second Circuit concluded: "What is important is encouraging the detection and cessation of anticompetitive behavior, not the amount of damages found." *Id.*

The decisions of the District Court and the Court of Appeals in this case with respect to the amount of fees are equally consistent with governing case law. As the District Court found, this was an "extremely complex action involving unique issues" which "proceeded at a breakneck pace." *USFL v. NFL*, 704 F. Supp. 474, 485 (S.D.N.Y. 1989). The Court of Appeals gave the District Court's discretionary findings the deference that is required by this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).[2] The Court of Appeals properly upheld the District Court's award and its reduction of the lodestar by thirty percent, particularly in light of the fact that, as the District Court concluded, the USFL already had reduced voluntarily its request by twenty percent, had charged historic billing rates, rather than current billing rates, and had understated the time actually spent on the litigation. Although the NFL complains further that the USFL was awarded fees for time spent on unsuccessful matters, the Court of Appeals, once again engaging in an appropriate application of the *Hensley* decision, concluded that all of the USFL's claims involved "common core of facts" and are "based on related legal theories." 461 U.S. at 435 (1983).

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[1] Citation to the unreported Second Circuit opinion in *USFL v. NFL*, No. 1265, August Term, 1988 (2d Cir. 1988), which is set out in Appendix A to the NFL's petition, is in the form "A ___."

[2] As explained in greater detail below (see pp. 15-18 *infra*), the decision in *Hensley* is relevant to the amount of reasonable fees to be awarded under Section 4 of the Clayton Act but not to whether a plaintiff suing under Section 4 of the Clayton Act is entitled in the first instance to an award of fees.

Together these resulted in the finding of injury to the USFL (A12-A13). The NFL's petition in effect asks this Court to review the entire 12,000 page transcript of this case and to overturn a fact-based decision made twice by the District Court (on the merits and in awarding fees) and again by the Court of Appeals in affirming the District Court's fee award.

In short, the Second Circuit's straightforward application of the governing case law presents no issue worthy of review by this Court.

STATEMENT OF THE CASE

A. The Litigation On The Merits

The USFL commenced this action in 1984, alleging that the NFL's unlawful monopolization of major league professional football had prevented the USFL from competing effectively in the professional football industry. As observed by the District Court, the "litigation proceeded at a breakneck pace, as required by the Court's scheduling orders." *USFL v. NFL*, 704 F. Supp. 474, 485 (S.D.N.Y. 1989).

After several months of preliminary skirmishing, discovery began in earnest on an expedited track, which led to a trial less than one year following its commencement. The District Court personally supervised this discovery, declining to refer discovery matters to a magistrate, and frequently heard the parties on short notice throughout the discovery period. Throughout the summer and fall of 1985, the parties exchanged and reviewed hundreds of thousands of documents and conducted over fifty depositions, often on multiple tracks, at which over 2,000 exhibits were marked. The parties' cross-motions for summary judgment, extensive briefing of numerous evidentiary issues, and preparation of an exhaustive pretrial order occupied the full attention of all counsel throughout the winter and early spring of 1986. The complexity of this action was enhanced by the unique nature of many of the central issues, including the existence of an antitrust

exemption peculiar to the industry and the interrelationships between a professional football league and its member teams, players, stadiums, potential markets, and the purchasers of its product. Moreover, the NFL's superior financial resources were deployed so as to impose enormous litigation burdens on the USFL, whose lead counsel was opposed by no fewer than three blue-chip firms representing the NFL.[3]

The trial began on May 14, 1986. Over the next two and one half months, the parties called 43 witnesses, filled over 7,000 pages of transcript, and filed over 130 briefs on difficult issues of antitrust and evidence law, many on short notice. When the litigation was over, the USFL had obtained one of the most difficult results in all of antitrust litigation: a private plaintiff, acting without benefit of prior adjudications or assistance from the Justice Department, secured the judicial finding that an entire industry had been illegally monopolized in violation of Section 2 of the Sherman Act, and established further that it had been injured by this unlawful monopolization. Nonetheless, the jury awarded the USFL only nominal damages of $3 after statutory trebling for its victory on its broad Section 2 monopolization claim, and found for the NFL on the remaining counts.

After trial the NFL moved for judgment notwithstanding the verdict, contending that in light of the jury's other findings its verdict for the USFL could not stand. In rejecting this motion and holding that the USFL had in fact proved a relevant market, the NFL's monopoly power in that market, predatory conduct in this market, and resulting injury, the District Court cited to extensive record proof of the NFL's anticompetitive conduct and the resulting effect of that conduct on the USFL.

The District Court thus explicitly rejected the NFL's contention that the jury's failure to find liability on the television-specific claims meant that television issues were irrelevant to

[3] Published reports indicate that the NFL spent $26 million defending this action, an amount nearly five times the District Court's award to the USFL.

the USFL's victory. In addition, the District Court noted that the NFL's television-related behavior was relevant to " 'the purpose and character' of the remainder of NFL conduct under the jury's scrutiny," *USFL v. NFL*, 644 F. Supp. 1040, 1058 n.15 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988), and cited a litany of conduct supporting the jury's finding of predatory actions. 644 F. Supp. at 1058. These findings were not disturbed on appeal.[4] Thus, the NFL's repeated suggestion—made throughout its petition—that the television evidence did not bear on the findings of monopolization is contradicted by the record. Moreover, this specific argument was rejected both by the District Court in its decision on the fee petition, *USFL v. NFL*, 704 F. Supp. 474, 480-81 (S.D.N.Y. 1989), and by the Court of Appeals when it affirmed that award (A9-A10, A12). The NFL's illegal monopolization and liability therefore are at this stage a given; the only issue to be addressed—and which the District Court and the Second Circuit have amply addressed—is that of the award of attorneys' fees.

B. The Fee Award

Following the Second Circuit's affirmance of the jury verdict, *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988), the USFL filed the appropriate motion papers accompanied by detailed affidavits supporting the award of fees and costs. The NFL received substantial discovery from USFL counsel relating to the request, and the issues were fully briefed. As the District Court recognized, the NFL did not challenge the reasonableness of the hourly rates charged by the USFL and did not assert that the time expended on any specific element of

[4] The NFL filed a so-called "conditional" cross-appeal from the jury's finding of an unlawful NFL monopoly that injured the USFL, but asked that this cross-appeal be considered only if the Second Circuit had declined to affirm the jury's verdict and the judgment *for the USFL* entered thereon. Since the NFL chose to make the cross-appeal conditional it cannot now be heard to complain—as it implies throughout its brief—that the evidence supporting the finding of unlawful monopolization should be reexamined.

the litigation was not reasonably spent. *USFL v. NFL*, 704 F. Supp. 474, 485 (S.D.N.Y. 1989). These concessions belie the NFL's present contentions (Petition, pp. 13, 20) that somehow plaintiffs engaged in unnecessary discovery and motion practice and prolonged the trial.

The District Court's final award of attorneys' fees totalled $5,529,247.25, and the Court also awarded costs totalling $62,220.92. This award was over two million dollars below the $7,662,702.13 sought by the USFL. As the District Court itself recognized, the $7.7 million request itself was "somewhat lower that it legitimately could have been." 704 F. Supp. at 486, in light of the fact that the USFL charged historic rather than current rates, understated time, and eliminated questionable time. All told, the USFL voluntarily reduced the lodestar by 20% or nearly $2 million. Although Judge Leisure rejected the NFL's claim that the fee request had not been properly documented, he did reduce the award by 10% as a consequence of vague or ambiguous time entries. The NFL no longer challenges the 10% reduction for vagueness.

Turning to the merits of the USFL's petition, the District Court held that the USFL was entitled to an award of fees. Noting that "[t]he NFL concedes, as it must, that a prevailing antitrust plaintiff is entitled to attorneys' fees under Section 4 of the Clayton Act," 704 F. Supp. at 478, the Court concluded that "the jury's finding of injury and an antitrust violation precludes the NFL's arguments that the USFL was not a prevailing party." *Id.* at 480. The District Court rejected the NFL's attempt to read additional requirements into Section 4, holding that statutes mandating the award of attorneys' fees, such as Section 4, are not governed by the "prevailing party" standard of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The "prevailing party" standard applies to statutes which, *unlike* the Clayton Act, use the term "prevailing party" and also make the award of attorneys' fees

discretionary with the Court. 704 F. Supp. at 478-79.[5] The District Court also held that Section 4 did not require the USFL to prove a specific amount of damages in order to recover attorneys' fees. The District Court noted that such an interpretation was at odds with the "host of cases" awarding attorneys' fees after a recovery of nominal damages. *Id.* at 479-80. The District Court thus concluded that "[t]he award of counsel fees itself is therefore a non-issue." *Id.* at 480.

Notwithstanding the USFL's voluntary reductions, however, the District Court carefully considered all the factors required by governing case law and held that in light of the USFL's limited success, the Court was obliged to reduce the USFL's fee by an additional 20%, on top of the USFL's voluntary concessions and his earlier 10% reduction for the partially vague time entries. 704 F. Supp. at 486. The USFL was, however, awarded full fees for the time spent prosecuting the fee application.

C. The Court of Appeals' Affirmance

On appeal to the Second Circuit, the NFL raised four basic arguments, each of which was rejected unanimously by the Court. First, the NFL argued that the USFL was not entitled to fees under Section 4 of the Clayton Act. The Second Circuit, however, agreed with the District Court that "[t]he award of counsel fees itself is . . . a non-issue." (A10, *quoting* 704 F. Supp. at 480). The Second Circuit concluded under the plain meaning of Section 4 that since the jury in this case found that the NFL's monopolization of the United States major professional football market injured the USFL, the awarding of attorneys' fees to the USFL was mandatory. (A7.) The Court regarded the NFL's reliance on the "pre-

[5] However, *Hensley* and other civil rights cases are relevant to determining the *amount* of a reasonable fee, since in passing Section 1988, Congress intended that the amount of fees awarded be governed by the same standards as other complex federal litigation, such as antitrust cases. See *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983); S. Rep., No. 94-1011, p. 6 (1976), 1976 U.S. Code Cong. & Admin. News 5908, 5913.

vailing party" standard of *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), as misplaced because (1) there is no requirement in Section 4 of the Clayton Act that an antitrust plaintiff be a "prevailing party" to recover attorneys' fees, and (2) *Hensley* involved an award of attorneys' fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides for the *discretionary* award of fees. The Court recognized that the award of only nominal damages to the USFL did not affect the right to fees and concluded that the award of fees vindicated important public policies of encouraging private parties to bring antitrust actions (A8-9). The Court also rejected the NFL argument that proof of damages resulting from the NFL's monopolization of television contracts had no impact on the jury verdict and concluded instead "[i]t is at least plausible that the evidence of the damages from television-related conduct influenced the jury's finding of generalized monopolization damages." (A10.)

The second focus of the NFL's appeals was to challenge the amount of the fee award. The Court rejected each of the NFL's arguments with respect to this issue. The Court recognized that the District Court had discretion with respect to the amount of the award, that it considered the relevant factors, and that it therefore acted within its discretion. (A10-A15.) The Court held that the twenty percent reduction on top of the previous ten percent reduction for vagueness reflected an appropriate consideration by the District Court of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (A13-A15). The Court also recognized that the USFL was entitled to the attorneys' fees relating to the television contract claim, allegations dismissed before trial, and unsuccessful collateral matters because all such work related to the common core of facts that resulted in the successful proof of antitrust injury. (A11-A15.)

The NFL apparently has now abandoned its third and fourth arguments in the Second Circuit—that compensation for paralegal time and the award of out-of-pocket expenses

was improper. The Second Circuit held that the award of paralegal fees correctly foreshadowed the Court's decision in *Missouri v. Jenkins*, 57 U.S.L.W. 4735 (U.S. June 19, 1989), and that the award of expenses was appropriate in light of the decision in *Reichman v. Bonsignore Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987).

REASONS FOR DENYING THE WRIT

The rulings of the District Court and the Court of Appeals are entirely consistent with the uniform holding of the courts (1) that the award of attorneys' fees to the antitrust plaintiff who proves anticompetitive conduct and injury is mandatory, and (2) that the amount of fees awarded lies within the sound discretion of the District Court. Petitioners have cited no authority to the contrary, and have presented no special and important reasons why the unanimous affirmance by the Court of Appeals should be reviewed by this Court.

1. *The Courts Have Consistently And Properly Awarded Attorneys' Fees To Plaintiffs Like The USFL Who Have Proven Antitrust Injury*

Determining whether an antitrust plaintiff is entitled to recover its costs and attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15, is a simple matter. Section 4 states explicitly, "[A]ny person *who shall be injured* in his business or property by reason of anything forbidden in the antitrust laws . . . *shall recover* threefold the damage by him sustained, *and the cost of suit, including a reasonable attorney's fee*" (emphasis added). The jury in this action was instructed that to hold the NFL liable to the USFL for unlawful monopolization, it had to find (1) that the NFL possessed monopoly power in a relevant market; (2) that the NFL knowingly acquired or maintained this power; (3) that this power was acquired or maintained through anticompetitive conduct; and (4) *that this conduct injured the USFL*. The jury expressly found each of these four elements, thereby entitling the USFL to treble damages, costs, and attorneys' fees under Section 4 of the Clayton Act.

The law is clear that the courts lack discretion to deny attorneys' fees to an antitrust plaintiff who has proved the foregoing elements. Thus, in *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240, 261, this Court concluded:

> "Under the antitrust laws, . . . allowance of attorneys' fees to a plaintiff awarded treble damages is *mandatory*." (footnote omitted; emphasis added)

Accord, e.g., Christianburg Garment Co. v. EEOC, 434 U.S. 412, 415 & n.5 (1978); *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *Hydrolevel Corp. v. American Soc. of Mechanical Engineers*, 635 F.2d 118, 130 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982); *Baughman v. Cooper-Jarret, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). As the Second Circuit concluded in its opinion in this case: "An injury having been found, the awarding of attorney's fees to the USFL was compulsory" (A7).

In short, there is no support in the cases or the language of the statute for the NFL's argument (Petition, pp. 16-18) that damages must be proven. Indeed, nominal damages were awarded, and, as the Court of Appeals correctly concluded, "[t]he award of only nominal damages to the USFL does not affect its right to attorneys' fees" (A7). *Accord, e.g., Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *Rosebrough Monument Co. v. Memorial Park Cemetary Ass'n*, 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 390 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). Indeed, for all the NFL's rhetoric on this issue, *it cannot cite a single private action under Section 4 where attorneys' fees to a plaintiff which recovered nominal damages were denied.* No court has misread or rewritten the Clayton Act in the manner urged upon this Court by the NFL.

The NFL attempts to escape these clear holdings by arguing that the so-called "prevailing party" test of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), applies here. The Court of

Appeals properly rejected this argument for two reasons (A8-A9). First, there is no requirement in Section 4 of the Clayton Act that an antitrust plaintiff be a "prevailing party" to recover attorney's fees. The term "prevailing party" appears nowhere in Section 4 of the Clayton Act. All that is required is an injury. Second, *Hensley* involved the award of attorneys' fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1982), which provides, in pertinent part, that "the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added.) Here, on the other hand, the award of attorneys' fees was mandatory since liability was found. Therefore, *Hensley* is irrelevant to the issue of entitlement to fees.

Indeed, this Court itself has recognized the distinction between mandatory and discretionary fee-shifting statutes. As the Court observed in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 (1978), in contrasting by specific citation mandatory statutes such as Section 4 of the Clayton Act with discretionary statutes such as the Civil Rights Act of 1964:

> "Some of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. But many of these statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of statutory policy to the discretion of the district courts." (footnotes omitted.)

This Court made the same critical distinction in *Alyeska Pipeline Service Co. v. The Wilderness Soc.*, 421 U.S. 240, 260-62 (1975).

In short, the NFL's "prevailing party" argument can only be made to Congress; this Court cannot amend the Clayton Act to change its criteria for the entitlement to fees to those found in some other statute, such as Section 1988.[6] This Court

[6] In contrast, Section 16 of the Clayton Act, 15 U.S.C. § 26, authorizes fees to a plaintiff who "substantially prevails" in an action for injunctive relief. While the NFL relies on Section 16 (Petition, pp. 16-17), in fact, the

has emphasized repeatedly that it has "no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). *Accord, e.g., United States v. Locke*, 471 U.S. 84, 95 (1985). Since the NFL's petition seeks just such a substitution of the Court's views for that of Congress, it should be denied.

2. ***The Award Is Consistent With Public Policy***

As the above analysis of the governing statute and uniform case law makes clear, the NFL's challenge to the USFL's motives in filing suit is simply irrelevant to the USFL's entitlement to fees for proving that the NFL is an illegal monopoly which had injured the USFL. Nonetheless, as the decisions awarding fees where there is a finding of injury have emphasized, the award of fees in this case in fact vindicates important public policies.

Although the NFL relies heavily on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (Petition, p. 19), that decision in fact supports the USFL's position, and not that of the NFL. *Brunswick* holds that

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 789 (emphasis in original).

In this case, the jury answered a specific interrogatory directed at this issue and found that the NFL's acts had injured the USFL.

Thus, as the Court of Appeals in this case recognized, the award of fees is consistent with the public policy underlying the antitrust laws. The Court concluded:

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use of different language in Section 16 from Section 4 supports the USFL's position and not that of the NFL because it demonstrates that it is up to Congress, and not the courts to decide the appropriate test for the award of fees.

> "What is important is encouraging the detection and cessation of anticompetitive behavior, not the amount of damages found. Because of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney's fees must be sustained regardless of the amount of damages awarded." (A8.)

Other decisions are to the same effect. *See, e.g., Kelco Disposal Inc. v. Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988), aff'd, 109 S. Ct. 2909 (1989); *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). No decision is to the contrary.

The NFL argues that the USFL's alleged bad faith and alleged improper motives should have been considered (Petition pp. 13-14). Without belaboring the invalidity of the NFL's contentions, it cannot be denied that alleged improper motives are relevant only to the extent they negate either injury or damage causation; otherwise, they would constitute an impermissible unclean hands defense. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1986); *Kiefer-Steward Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951); *USFL v. NFL*, 842 F.2d 1335, 1369 (2d Cir. 1988). In this case, therefore, the NFL's entire argument is inconsistent with the jury's finding of antitrust injury. In the portion of the jury charge relating to antitrust injury, the jury was told that it could consider the NFL's "mismanagement" and "merger motive" evidence to show that the USFL's wounds were entirely self-inflicted. The jury's finding of antitrust injury in answering a specific interrogatory means that it considered and rejected these arguments by the NFL. Thus there is no factual predicate for the NFL's arguments with respect to the USFL's motives. As the District Court held in rejecting the argument that the veracity and motivations behind the lawsuit should have been reexamined in adjudicating the amount of fees to be awarded, "[T]he NFL ignores the fact that it was decisively, unquestionably, found to have violated the antitrust laws." *USFL v.*

NFL, 704 F. Supp. 424, 485 (S.D.N.Y. 1989). In light of these jury findings, and the District Court's thorough review of the record, there is no basis for requiring this Court to review a 12,000 page record to reexamine the USFL's motives.

3. *The Amount of the Award Is Within the District Court's Discretion*

This Court has emphasized that "the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The findings of the district court cannot be set aside unless clearly erroneous. *City of Riverside v. Rivera*, 477 U.S. 561, 572-73, 584 (1986) (plurality opinion; Powell, J., concurring); see *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Great deference to the lower courts' findings is especially appropriate in this action. The Second Circuit recognized throughout its opinion the District Court's thorough and proper handling of the case. The District Court presided over this case from its inception, maintaining hands-on, personal control of the action from the start of discovery through the jury verdict. The District Court's familiarity with the entire course of proceedings and first-hand observation of counsel left the District Court uniquely qualified to analyze fee-related issues, such as the interrelationships among claims advanced by the USFL and the effort required to bring this complex action from the filing of the amended complaint through to a jury verdict in less than fifteen months. The NFL's attempt to persuade this Court to wade through a record of 12,000 pages to relitigate these issues should be rejected.

A. The District Court Applied The Proper Standard In Evaluating the Fee Application

In its petition for certiorari, the NFL argues for the first time in this litigation for there to be a so-called "rational re-

lationship between the fee award and the result obtained" (Petition, pp. 9-10). Even the NFL did not make such an argument in the lower courts.

Rather, the NFL's brief to the Second Circuit conceded that "[t]he fee determination starts with a calculation of the lodestar: "the number of hours reasonably expanded on the litigation multiplied by a reasonable hourly rate" (NFL Second Circuit Brief at 26, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). *Accord, e.g., Blum v. Stenson*, 465 U.S. 886, 888 (1984). In this case, the NFL did not challenge the reasonableness of the hourly rates claimed by the USFL, nor did it assert that any of the USFL's hours were not reasonably spent. *USFL v. NFL*, 704 F. Supp. 474, 484 (S.D.N.Y. 1989). There can also be no serious doubt that the District Court applied the twelve relevant factors in determining whether to adjust the lodestar amount set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and approved by the Supreme Court in *Hensley*. 461 U.S. at 430 & n.3.[7] Of these, only a portion of one of the twelve factors, the results obtained, pointed to a lower than maximum fee award. As the Court of Appeals recognized in affirming the amount of the 30% reduction that the District Court in fact imposed, the District Court considered the relevant factors in determining the amount it would reduce the fees as a consequence of the results, including (1) the USFL's voluntary reduction of 20% in the amount of fees sought, (2) the USFL's decision to charge historic rather than current rates, and (3) the USFL's understatement of time (A14). There is no basis in law or policy for adding another

[7] The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

factor, that of the Court's subjective interpretation of plaintiffs' motives in filing suit, to the fee issue.

In arguing that the Court of Appeals and the District Court should have engaged in a different framework of analysis, the NFL distorts the decisions in both *Hensley* and *City of Riverside v. Rivera*, 477 U.S. 561 (1986). *Rivera* in fact affirms a fee award totalling $245,456.25—representing full compensation at $125/hour for every single hour spent on the litigation. Justice Powell's concurring opinion in fact turns on the discretion appropriately placed on the district court and explicitly rejects petitioners' argument for a "rule of proportionality between the fee awarded and the damages recovered." 477 U.S. at 581-86. Justice Rehnquist's dissent focuses on what it regards as the unwarranted amount of time respondents' lawyers spent on the case. 477 U.S. at 588-96. No such claim is made in this case. Moreover, the suggestion that *Hensley* stands for the proposition that "the result is what matters" (NFL Petition, p. 12) is absurd. In fact, as described above, *Hensley* supports the application of the very criteria applied here by the lower courts, see 461 U.S. at 429-432, and was specifically relied upon by the District Court, *see* 704 F. Supp. at 486, as the basis for its reduction. The specific reference to results in *Hensley* is preceded by the observation that, "[l]itigants in good faith may raise alternative grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. Of course, as described below (see pp. *infra*), this conclusion from *Hensley* itself supports the refusal of the Court of Appeals to hold that the District Court's award constituted an abuse of discretion.

4. *The Lower Courts Did Not Err In Their Assessment Of The Issues That Contributed To The USFL's Victory*

The NFL continued to claim that the District Court failed to exclude from its award fees for time spent on what it regards as "collateral matters" (Petition, pp. 14-15). As an initial matter, the NFL's argument is fatally flawed because, as stated by the District Court, 704 F. Supp. at 481, even though

the NFL had complete access to the original computer runs of the USFL's billable time, and adequate opportunity for a comprehensive review of that material, it did not identify any time devoted exclusively to these allegedly non-compensable activities. Thus, as this Court held in *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984), the NFL's contentions are insufficient as a matter of law because the NFL failed to submit "*evidence* challenging the accuracy and reasonableness of the hours charged" (emphasis added) in order to create an issue of fact sufficient to require an evidentiary hearing.

Moreover, both the District Court and the Court of Appeals applied the relevant test—which is whether all the work done was "in relation to the common case of facts that resulted" in antitrust injury to the USFL and were "based on related legal theories" (A12-A13). See *Hensley v. Eckerhart*, 461 U.S. 424, 435-37 (1983). With respect to the television claim, both courts properly concluded that, as the Court of Appeals put it, "the television damage claim was related to the general claim of monopolization of the professional football market in the United States" (A12). As the District Court stated on more than one occasion, the rejection of Section 1 television claims did not mean that the jury did not consider such evidence as probative of the purpose and character of the remaining NFL conduct. *USFL v. NFL*, 644 F. Supp. 1040, 1058 & n.15 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (1988); *USFL v. NFL*, 704 F. Supp. at 480. Similarly, as the Court of Appeals concluded, the work done in relation to certain allegations that were dismissed before trial was properly included "because it was related to the same claim upon which the USFL eventually prevailed" (A12).

The NFL has presented no explanation of why there are "special and important reasons" within the meaning of Rule 17 why this court should devote its limited resources to scouring a 12,000-page record to reconsider lower court determinations of issues of this sort.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

UNITED STATES FOOTBALL LEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Reply Brief in Support of Petition For a Writ of Certiorari

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
1. There Must Be A Rational Relationship Between Any Attorney's Fee Award And The Result Obtained	3
2. The USFL's Bad Faith And Improper Motive In Bringing Suit Should Have Been Considered By The Courts Below	5
3. Time Devoted To Claims Which Are Dismissed Before Trial Or Rejected At Trial Should Not Be Compensable	6
4. Attorney's Fees Should Not Be Awarded To A Plaintiff Which Proves Violation And Injury But Fails To Prove Damages	7
5. Attorney's Fees Should Not Be Awarded To A Plaintiff Which Is Not A Prevailing Party Under *Hensley*	8
6. This Petition Presents Important Questions Of Federal Antitrust Law	9
CONCLUSION	10

In rejecting the "heart" of the USFL's case, its television claims, and awarding the USFL only $1 in damages, the jury in this case found that the USFL should not be rewarded for its own self-destruction and improper attempt to force a merger with the NFL, including the very filing of this lawsuit. The Second Circuit's affirmance of an attorney's fee award as "reasonable" that is 5.5 million times the result obtained in effect nullifies the jury's verdict and is totally inconsistent with the Second Circuit's own opinion on the merits of this case. *See USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988).

As a result of the Second Circuit's opinion, prospective plaintiffs like the USFL will make litigation decisions in large part based upon the likelihood and extent of their recovery of attorney's fees. If windfall fees are too readily available, lawsuits that are at best marginal and at worst brought for improper purposes will proliferate.

On the other hand, defendants may face a Hobson's choice: litigate and face the possibility of shouldering enormous attorney's fees even if plaintiff achieves only a nominal result, or pay an extortionate settlement to avoid the uncertainty of an irrational attorney's fee award that is a substitute for the jury's rejection of the plaintiff's claims on the merits. As demonstrated in the Petition, there will be no diminution of the effective encouragement of private litigation under fee-shifting statutes such as Section 4 of the Clayton Act by a rule of law that requires a rational relationship between an attorney's fee award and the results obtained. Respondents' opposition brief completely ignores these serious policy issues.

In addition, the USFL's suggestion that review of this case would require the Court to engage in "scouring a 12,000-page record" (Respondent's Brief in Opposition ("Opp. Br.") at 18) is wrong. This Court need look no further than the Second Circuit's merits opinion to see that the fee award is manifestly unjust. The issues raised in the Petition are unresolved

and controversial questions of law, not matters of fact requiring *de novo* review by the Court.

The requirements that a fee award (i) be rationally related to the result obtained; (ii) reflect the plaintiffs' improper motive in bringing the action; (iii) meet the *Hensley* "prevailing party" standard in a private antitrust case; (iv) not be made unless a plaintiff proves damages as required by Section 4 of the Clayton Act; and (v) not reimburse a plaintiff for time devoted to failed claims where he has obtained only paltry results are all questions of law, not fact. Petitioners respectfully submit that these legal questions were decided incorrectly below by the district court and the Second Circuit.

ARGUMENT

As demonstrated below, the Petition presents important questions of public policy that should be resolved by this Court.

1. There Must Be A Rational Relationship Between Any Attorney's Fee Award And The Result Obtained

In the Petition, the NFL demonstrated that in all cases in which a fee-shifting statute is involved, there must be a rational relationship between the fee award and the result obtained (NFL Cert. Petition at 9-13).[2] In a series of decisions, this Court has sought to prevent the award of windfall attorney's fees. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). And in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), Justice Powell's controlling concurrence stressed that, when making a fee award, the court *must* "give primary consideration to the amount of damages awarded as compared to

[2] Citation to the National Football League's Petition for A Writ of Certiorari is in the form: NFL Cert. Petition at .

the amount sought." *Id.* at 585. The USFL ignores this consistent Supreme Court authority.[3]

The USFL argues that the district court applied the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and that of these factors only "the results obtained, pointed to a lower than maximum fee award" (Opp. Br. at 16). According to the USFL, the twenty percent reduction selected by the district court is beyond review merely because it purportedly reflected the court's discretion (Opp. Br. at 16). This argument suggests that this Court should never have reviewed the *Hensley*, *Blum*, or *Delaware Valley* cases.

The USFL's reliance on the factors set forth in *Johnson* is misplaced (Opp. Br. at 16). In *Hensley*, this Court held that almost all of "these [*Johnson*] factors usually are subsumed" in the lodestar. 461 U.S. at 434 n.9. The Court emphasized that "the [calculation of the lodestar] does not end the inquiry." *Id.* at 434. Where, as here, the plaintiff has only a partial or limited success, *Hensley* teaches that the fee *must* be adjusted downward:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a law-

[3] The USFL's argument that the Court should reject the Petition because the NFL did not make such an argument in the lower courts (Opp. Br. at 15-16) is wrong. Both in the district court and in the Second Circuit, the NFL maintained that *Riverside* mandates that the court, in determining an attorney's fee, set a rational or proportionate relationship between the amount of damages recovered and the fee to be awarded. *See* Brief for Defendants-Appellants NFL at 32-35, filed in *USFL v. NFL*, 887 F.2d 408 (2d Cir. 1989); Brief for Defendants NFL at 35-36, filed in *USFL v. NFL*, 704 F. Supp. 474 (S.D.N.Y. 1989). In this case, such a relationship would lead to an award of no fees or a nominal award.

> suit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Id. at 436.

Petitioners respectfully submit that this Court should make clear that the downward adjustment *must* have a rational relationship to the degree of success obtained.

In making its strained argument, the USFL incorrectly suggests that it is absurd for the NFL to argue that "the result is what matters" (Opp. Br. at 17). But this is not the NFL's statement; it is this Court's in *Hensley*. 461 U.S. at 435. Indeed, the result obtained is "particularly crucial" where, as here, a plaintiff unquestionably has "succeeded on only some of his claims for relief" (*id.* at 434), and his claims are not "interrelated, non-frivolous [or] raised in good faith." *Id.* at 436. The Second Circuit's affirmance of an award bearing no rational relationship to the results obtained thus ignores *Hensley*.

Finally, that the fee award should bear a rational relationship to the result obtained simply echoes the language of Section 4 of the Clayton Act that a prevailing antitrust plaintiff shall recover a "reasonable" attorney's fee. A "reasonable" fee means reasonable in relation to the result obtained. *See Hensley*, 461 U.S. at 432-36. Any quarrel with this truism can only posit that the relationship should not be rational—surely a position unsupported by the language of Section 4 and *Hensley* but nevertheless advanced by the USFL and, apparently, accepted by the courts below.

2. The USFL's Bad Faith And Improper Motive In Bringing Suit Should Have Been Considered By The Courts Below

In the Petition, the NFL showed that when making the attorney's fee award, the courts below ignored their own factual findings that the USFL had brought this action in bad faith and to force a merger with the NFL (NFL Cert. Petition at 13-14). The USFL does not contest that such findings were made by the courts below. Rather, the USFL simply reiter-

ates that it suffered an injury and argues that its improper motives "are relevant only to the extent they negate either injury or damage causation" (Opp. Br. at 13-14). The USFL also argues that the jury finding of antitrust injury shows that it considered and rejected the NFL's "mismanagement" and "merger motive" evidence and that, therefore, "there is no factual predicate for the NFL's arguments with respect to the USFL's motives." *Id.*

These arguments fly in the face of the jury's verdict and Second Circuit's merits holding. With respect to the relevance of this evidence, the Second Circuit noted that "[c]ourts do not exclude evidence of a victim's suicide in a murder trial," *USFL v. NFL*, 842 F.2d at 1370, and that evidence of the USFL's self-destructive merger strategy was properly admissible not only on causation issues but also on damages issues. Accordingly, mismanagement and merger motive evidence was properly admitted at trial and "was highly probative on the central issue of whether the USFL's alleged injury and damages . . . were caused by the NFL's anticompetitive conduct or by the USFL's own deliberate business judgments." *Id.* at 1369.

Because the attorney's fee award is part of the damages remedy (*see, e.g., Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404, 411 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989)), the court should have considered this evidence when making the fee award, particularly since the jury so clearly considered it in determining to award only nominal damages. Thus, it is once again "frivolous" for the USFL to suggest that this evidence constitutes "*in pari delicto*" evidence that the court was prohibited from considering in the fee determination. *See USFL v. NFL*, 842 F.2d at 1369.

3. Time Devoted To Claims Which Are Dismissed Before Trial Or Rejected At Trial Should Not Be Compensable

In the Petition, the NFL showed that the Second Circuit's award of fees to the USFL for time devoted to its rejected television case, claims dismissed before trial, state law claims, and other irrelevant, collateral matters was improper because

these matters could not have contributed to its verdict (NFL Cert. Petition at 14-15).

The USFL does not contest this showing by the NFL. Rather, it merely repeats the statement by the courts below that the television claims were related to the general claim of monopolization (Opp. Br. at 18). This is irrelevant. Even with respect to the rejected television case, no damages could have flowed from the NFL's television related conduct because it was legal and, therefore, the television evidence could only illuminate legal conduct because it was itself legal. Moreover, far from being required to "devote its limited resources to scouring a 12,000-page record to reconsider lower court determinations of issues" (Opp. Br. at 18), this Court faces a pure question of law: whether attorney's fees should be awarded for time spent on a damages case that is entirely and thoroughly rejected by the jury and therefore cannot have contributed to a verdict on other distinct issues.[4]

4. Attorney's Fees Should Not Be Awarded To A Plaintiff Which Proves Violation And Injury But Fails To Prove Damages

In the Petition, the NFL showed that the Second Circuit's holding that a finding of injury is all that is required for an award of attorney's fees under Section 4 is contrary to case law, the plain meaning of the Clayton Act and congressional intent (NFL Cert. Petition at 16-18). To recover under Section 4, plaintiff must prove an amount of damages attributable to the violation and antitrust injury found by the jury.

[4] The USFL claims that the NFL's challenge is "flawed" because the NFL "did not identify any time devoted exclusively to these allegedly non-compensable activities" (Opp. Br. at 17-18). The USFL is wrong because (a) the USFL, not the NFL, bore the burden of establishing which hours were successfully spent (*see Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1215 (3d Cir. 1978) ("plaintiff bears the burden of proving what hours were devoted to [successful] claim[s]"); and (b) as the NFL showed below, and as the courts below recognized (*see USFL v. NFL*, 704 F. Supp. 474, 477 (S.D.N.Y.), *aff'd*, 887 F.2d 408 (2d Cir. 1989)), the USFL's time records were too vague to permit the parsing which it now invites.

The USFL fails entirely to address any of the arguments and cases set forth by the NFL. It continues to confuse proof of injury with proof of damages. The USFL incorrectly asserts that to recover attorney's fees under Section 4 "[a]ll that is required is an injury" and that there is "no basis for the NFL's argument that proof of damages is yet an additional requirement" (Opp. Br. at 2, 12). Section 4 necessarily requires proof of "damages in some amount susceptible of expression in figures." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 909 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). An antitrust defendant is entitled to a directed verdict where the plaintiff fails to prove damages. *Id.* Here the USFL does not dispute what the Second Circuit suggested: that the $1 verdict was the equivalent of no damages at all. *See USFL v. NFL*, 842 F.2d at 1377.

Finally, the Petition demonstrated that the USFL failed miserably in its attempt to prove damages flowing from the only violation found by the jury. The USFL does not contest this fact. Having failed to prove damages, the USFL should not have recovered any fees under Section 4.

5. Attorney's Fees Should Not Be Awarded To A Plaintiff Which Is Not A Prevailing Party Under *Hensley*

The Petition showed that the prevailing party standard set forth in *Hensley* applies in antitrust cases and civil rights cases alike, and that the courts below erred by declining to apply it to this case (NFL Cert. Petition at 18-19).

The USFL argues that because the term "prevailing party" does not appear in Section 4 and because the Clayton Act is a mandatory statute, the standard is inapplicable to antitrust cases (Opp. Br. at 12). This argument ignores this Court's statements in *Hensley* and in *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486 (1989), as well as the court's thorough analysis of this issue in *Reazin v. Blue Cross & Blue Shield, Inc.*, 663 F. Supp. 1360, 1449-50 (D. Kan. 1987). *See* NFL Cert. Petition at 18-19.

6. This Petition Presents Important Questions Of Federal Antitrust Law

The Petition explained that to discourage plaintiffs from filing broadly alleged and poorly grounded treble damage actions seeking anticompetitive results, there must be some limit upon the award of attorney's fees to parties that obtain *de minimis* results (NFL Cert. Petition at 19-20). Failure to develop such limits causes great harm, straining limited judicial resources and deterring parties from engaging in what may well be procompetitive behavior. The benefit of such suits, by contrast, is negligible at best.

The USFL does not address these important policy concerns. The NFL respectfully submits that where, as here, the plaintiff brings suit in bad faith to force an anticompetitive merger and has eight of its nine claims rejected, including the conceded "heart" of its case, is awarded only $1 in damages and denied any injunctive relief, that plaintiff should not be given a windfall attorney's fee award. Paying such a high price for private enforcement of the antitrust laws could not have been contemplated by Congress and should not be condoned by the judicial system.

CONCLUSION

For the reasons demonstrated above and in the NFL's Petition for a Writ of Certiorari, a Writ of Certiorari to review the decision of the Second Circuit should issue.

Dated: January 8, 1990

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